IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CSX TRANSPORTATION, INC., Plaintiff,	)	CIVIL ACTION NO. 2:18cv530
v.	)	
NORFOLK SOUTHERN RAILWAY COMPANY, et al., Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
(*Daubert* Hearing)

Norfolk, Virginia

December 2, 2022

BEFORE: THE HONORABLE ROBERT J. KRASK
United States Magistrate Judge

APPEARANCES:

MCGUIREWOODS LLP
By: Benjamin L. Hatch
Robert W. McFarland
Ashley P. Peterson
Counsel for CSX Transportation, Inc.

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- and -
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
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By: Alexander R. McDaniel
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(Proceedings commenced at 11:10 a.m.)

THE CLERK: CSX Transportation, Incorporated vs. Norfolk Southern Railway Company, et al.

Is plaintiff ready to proceed?

MR. HATCH: Good morning, Your Honor. Plaintiff CSX Transportation is ready to proceed.

THE COURT: Good morning.

THE CLERK: Are defendants ready to proceed?

MR. SNOW: Good morning, Your Honor, Ryan Snow for the Belt Line. We're ready to proceed.

THE COURT: Good morning.

MR. LACY: Good morning, Your Honor, Michael Lacy for Norfolk Southern. We're ready to proceed.

THE COURT: Good morning.

If you'll give me just a minute to get squared away on the bench. I apologize for the late start. Apparently the court has labor issues involving court reporters, just like the railroads are having some labor issues these days, but I'm grateful that attorneys never go on strike.

So my plan today would be to start with -- as I understand, we have three *Daubert* motions, Norfolk Southern's motion to exclude opinions from Dr. Marvel, the Belt Line's motion to exclude testimony from Dr. Marvel, and then we have CSX's motion in limine relating to Thomas Crowley.

I thought we probably would proceed in that order,

start with Dr. Marvel and Norfolk Southern, but before we proceed with argument, let me ask first:

Do any of the parties anticipate putting on witness testimony or evidence today? Mr. Hatch?

MR. HATCH: The plaintiff does not.

THE COURT: Thank you.

MR. SNOW: We do not, Your Honor.

MS. REINHART: Norfolk Southern does not, Your Honor.

THE COURT: Okay. Thank you for clarifying that.

So with that, then, I think we'll start with Norfolk Southern's motion. I'll be happy to hear from you.

Are there any kind of audiovisuals, and do you have copies for me?

MS. REINHART: No, Your Honor.

THE COURT: Thank you.

MS. REINHART: Good morning. May it please the Court. I'm Tara Reinhart for Norfolk Southern.

Your Honor, we're here today because we're close to trial, as Your Honor knows, and this case, brought by CSX, is largely an antitrust case, a couple other claims thrown in, but CSX is alleging that Norfolk Southern and NPBL foreclosed them from some marketplace and that that foreclosure harmed them and caused lost profits across their entire business. So it's a very serious, very broad claim that they are

bringing under the antitrust laws.

Yesterday we were in front of Judge Davis, and we were making some legal arguments on summary judgment that go to the same issues that we're facing here. Here we're focused on the economics. There's some overlap. They don't necessarily depend on each other, but it's important, I believe, for the Court to understand what the overall issues are before we get into the nitty-gritty.

And so with the Court's indulgence, what I would like to do is to first give an overview of the claims and the economics involved because of the antitrust principles and then go into the failures of Professor Marvel's modeling and talk about what that means.

Our view is that Professor Marvel should be excluded from the jury, all of his opinions, and all of his modeling should be excluded, because it simply fails. It's invalid; it's not probative; it's not helpful. And I have case law that I will be citing to specifically to support our argument.

So starting at the beginning, antitrust is intended generally to protect competition, and that means consumers. CSX is a competitor of Norfolk Southern. The antitrust laws do not go out of their way to protect competitors. Norfolk Southern under the antitrust laws, as a general proposition, does not have an obligation to help CSX or to make sure it's

not harmed, and even if Norfolk Southern were a monopolist, which we don't believe it is, they are allowed to compete vigorously, and under the antitrust laws and under the economics that go along with applying the principles, it's often difficult to tell the difference between vigorous competition and conduct that would be anticompetitive if Norfolk Southern had market power and exercised it improperly.

And so for that reason, economics are a big part of the case and a big part of this Court's responsibility to make sure that the jury is not misled by the expert testimony that's being offered. And here CSX is offering Professor Marvel for relevant market, causation, and damages. Those are three required elements. If either one of them is not satisfied, then the entire case is out the window. And so a lot is riding on his opinions and his analysis.

Let me give you his theory. This is going to be running through all three of his obligations that he's taken on related to relevant market, causation, and damages.

His theory is that Norfolk Southern took steps to exclude CSX from one marine terminal here in Hampton Roads. It's called the -- I might get this wrong -- National --

THE COURT: NIT, correct.

MS. REINHART: NIT, thank you, Your Honor.

-- NIT and that because of that exclusion, CSX was

harmed not only at NIT, where supposedly it can't serve its customers, but also the rest of Hampton Roads. For the entire relevant period, there were one, sometimes two other terminals that serve ocean carriers, but also that it was harmed more broadly across its entire intermodal network.

And so CSX and Norfolk Southern both serve ocean carriers who come from all over the world. They dock at different ports. Sometimes they start in New York, work their way down, go to Baltimore, Hampton Roads, Wilmington, Savannah, Jacksonville -- Jacksonville, I might have the wrong city there -- CSX would correct me if I'm wrong -- but they also go to Canadian ports; they go over to West Coast ports.

Their cargo, which is in containers that are built intentionally to be carried on carriers, trains, trucks, and barges, those cargo containers then are dispersed across the country. Sometimes they are filled up, sent back to the ports and exported. But by their nature, they are intended to travel on multiple modes of transportation, not just trains. And so these ocean carriers will, every several years, enter into contracts with railroads to handle the rail portion of their cargo carrying.

THE COURT: How long are those contracts typically? Is it two to three years, or three to four, or is there a fixed time period, or do they vary?

MS. REINHART: They vary. And I would say three to five years, they tend to be. And the carriers do tend to enter into contracts with one railroad to handle the bulk of their business on the East Coast.

So, for example, they'll negotiate with Norfolk Southern, and they will negotiate rates, terms of service, rates, terms of service, rates, rates, rates, terms of service; but they will negotiate, and they will end up using Norfolk Southern, same with CSX, for the bulk of whatever business they end up agreeing to.

THE COURT: And the choices these days, at least with respect to the intermodal traffic that's going a fair distance, are Norfolk Southern and CSX, correct?

MS. REINHART: So we would disagree with that, Your Honor, and this actually was a big part of our discussion with Judge Davis yesterday.

Just to put a fine point on it, the destinations inland are, as Your Honor understands, a variety of distances away. So Richmond and Washington, D.C., are a couple hundred miles -- hundred miles to a couple hundred miles, and then Chicago, of course, is more like a thousand miles away from here.

And so ocean carriers, in terms of their choices -- and this is important for the relevant market -- if they are shipping some local distance -- and we don't have to agree on

the facts. This Court does not have to decide what the correct distance is, but some distance between 200 and 500 miles, trucks are absolutely an option in addition to Norfolk Southern and CSX. And, in fact, in this particular marketplace, Hampton Roads, the port always publicizes these statistics; about 60 percent or more of the traffic coming out of Hampton Roads goes on trucks, not rail.

When you talk about the long distances, then Your Honor is correct in terms of rail choices, Norfolk Southern and CSX, but they also have choices of ports. And this is a big part of the record. I don't think it's in dispute.

For example, the Port of New York and New Jersey is actually the best location if you want to get to Chicago fast, and so ocean carriers tend to disembark their cargo containers that are destined for Chicago out of New York. They can also do it out of Norfolk, and of course, there's a lot of competition, not only between Norfolk Southern and CSX, but also between the ports for that kind of business.

So port competition is actually an option for long distances, and it's a real option.

So let me very quickly get through Professor Marvel's theory here. His theory is that because Norfolk Southern took these steps allegedly to block CSX from NIT, the carriers that called on NIT with a lot of their traffic -- in other words, they used NIT for more than 50

percent of their traffic that comes through Hampton Roads -- those carriers were beholden to Norfolk Southern. They did not have a choice. All of the choices that I just described to the Court, according to CSX, don't exist, and those carriers had to work with Norfolk Southern, and as a result, Norfolk Southern has market power at NIT, and that means that Norfolk Southern has the ability to increase prices to the carriers and increase its margins, all at the expense of the carriers and CSX. That's his theory.

And his theory is encompassed in his relevant market work that he did. I'm not going to call it analysis. He did not do a relevant market analysis. He described the market and determined it is what it is. But it also carries through his causation and his damages analyses as well.

So this Court's role in addressing Professor Marvel is to be a gatekeeper. And that's what *Daubert* -- I think the actual pronunciation is *"Daubert,"* but I'm going to put the "T" in there for the court reporter -- *Daubert*, the case that's been around for several decades, says that the Court has a responsibility, and that responsibility is because, even though expert testimony is very common now, and common especially in antitrust cases, CSX can't prove its claims in this case without expert testimony on the economics.

Expert witnesses have the potential to be, quote, both powerful and quite misleading, close quote. That's from

It's My Party, 88 F.Supp.3d, 475 at 483. That's a case that I would suggest Your Honor pay close attention to. We're going to focus on it a little bit later.

THE COURT: I have read it.

MS. REINHART: Thank you. Thank you, Your Honor.

THE COURT: And I'm familiar with that case law.

MS. REINHART: Excellent.

So that concern could not be more true here where, by any standard, if you look at what actually happened to CSX over the past 20 years, if you look at their experience in the marketplace, they've succeeded.

During the same period of time, when supposedly Norfolk Southern is a monopolist exercising improperly its market power to exclude/foreclose CSX from NIT, CSX increased its business at NIT tenfold, increased its business at Hampton Roads' ports by 12 times.

So that's why Professor Marvel's testimony is so important and why it's so important for this Court to consider whether he actually can show that whatever CSX's experience was -- and we think it's pretty darn good, not bad -- it's not caused by Norfolk Southern's conduct, and they're not entitled to damages.

THE COURT: That seems like a merits argument. Can we kind of dial into Dr. Marvel and your critiques of his analysis?

MS. REINHART: Absolutely. Absolutely.

So Professor Marvel designed two models that he says together show that there is harm to ocean carriers and also to CSX. And that harm in the sense of antitrust injury affects causation. In other words, the experience is caused by Norfolk Southern's conduct.

The problem is that those two effects models, they are designed the same way. One of them looks at the business of ocean carriers that use NIT intensively and looks at Norfolk Southern's pricing. The second one does the same thing but looks at Norfolk Southern's margins, and he says that those show that there's causation, but there are two major problems, and either one is fatal.

The first problem is that Marvel -- he's offered to prove causation, but he doesn't attempt to show it. He assumes it. His model, the way it's designed, simply assumes that there's causation. He doesn't study it through his model.

THE COURT: Let me ask you about that so I can at least maybe dial into some of the questions that the Court has, and one of them is this notion of, and he testifies, that he didn't consider -- his model doesn't seek to account for anticompetitive versus legitimate competitive factors that you've discussed in your filing.

I guess the question I have is can he do that in

other ways using his economic expertise? Can he make, in effect, a qualitative judgment so he, you know, posits this model that creates a quantitative finding that Norfolk Southern has the power to raise prices if you use -- if a carrier uses NIT more intensively? So that's his quantitative finding, and the question is can he marry that with a qualitative finding based on his economic expertise? What is your position on that.

MS. REINHART: So, first of all, he could not marry his current quantitative model with other evidence because it's completely insufficient. It fails. It's invalid. If he had done a different empirical analysis, a different quantitative analysis, certainly he could marry that with probative and -- what's the word? -- with qualified evidence that would establish causation.

What he should have looked at is the entire body of economic evidence that tells us what is the ocean carrier's experience, assuming that Norfolk Southern is a monopolist, and what is their experience if Norfolk Southern is just competing?

So that includes looking at all of the options of the carriers, looking at the costs of the railroads to provide their services, looking at the competitive conditions over time that changed the competitive dynamic, one being, for example, in the end of 2016, CSX, after a lot of

investment, was able to double-stack their trains out of Hampton Roads. That makes a difference. Economic conditions, downturns, upturns -- those make a difference.

He should have analyzed the whole body. He didn't have to use a regression analysis. There are other ways to do it. His other evidence that he points to -- and there are a lot of words in his report where he gives a narrative -- he gives a narrative about these issues -- he bases it on hearsay, he bases it on self-serving declarations of CSX folks who gave their declarations during this litigation. And that's almost it.

I mean, there's very little substance behind his additional evidence. It's anecdotal. It's not complete. It's simply his observations of some things that he's picking out. Others would call it cherry-picking. But it's not a complete analysis. So, no, Your Honor, he could not have done that.

So as Your Honor said, Professor Marvel himself acknowledged that his model does not assess whether anticompetitive conduct or natural procompetitive advantages caused CSX's experience. Again, I'm not going to say "harm" because I don't think that's what this shows. It's experience. So that means that it's entirely possible that CSX's experience, and that of the ocean carriers, is a result of all of these other things.

It's possible that part of what Professor Marvel is seeing is because of Norfolk Southern's conduct. We don't know how much. We're not going to know how much. And this is the problem.

THE COURT: Let me ask you that. So that raises another question, which is does he have to quantify? Let's say, just assume for the sake of argument, he creates this regression model, and he quantifies that Norfolk Southern has pricing power as a result of intensity of use. He makes a qualitative judgment based on his economic expertise. Let's just assume he's able to be rely on all that evidence he relies on for the sake of this question, that there is a connection between that pricing power -- some connection, not quantifying it, but some connection between that pricing power and anticompetitive conduct. If you assume all that, my question is this:

Does he have to quantify the extent of the harm at this first step in saying there's harm to carriers and it's due to anticompetitive conduct?

MS. REINHART: Your Honor, he does. He has to estimate -- that's the word that the economists use, "estimate." It's not perfect. We acknowledge that. But he has to estimate, number one, the effects on the ocean carriers, first and foremost, and that would be through an empirical analysis that would show that they're paying prices

that are higher than they would be but for this alleged conduct. He has not done that. And then he has to, at this stage, estimate that there's injury to CSX.

THE COURT: It says that he can't qualitatively make that judgment, that there's harm based on that some portion of that increased pricing power -- can you cite me a case that says he has to quantify that item? I don't think I saw that in your brief.

MS. REINHART: Your Honor, I think it is in our brief, and perhaps not in the words that Your Honor is using, but he needs to show that there is -- sorry. I just lost the Court's question.

THE COURT: Sure. Sorry. I'm happy to repeat it.

MS. REINHART: Thank you.

THE COURT: Do you have case law that says he has to quantify the extent of the harm? If he makes a judgment that there's harm due to anticompetitive conduct at the first step, does he have to make a quantification of that harm to the carriers?

His second step is to say CSX was harmed as well and here's my quantification of it, and we'll get to that later, I assume, but at that first step, does he have to do that? Is there a case that says that?

MS. REINHART: And, Your Honor, I will find a case for you that makes the point that Your Honor is asking us to

make. I want to make sure we're not saying two different things, because the Court is using the word "quantify" as though it's damages. That's not what I'm talking about. I'm talking about a matter of degree.

THE COURT: Yes. His model says there's harm, and he says it's because of anticompetitive conduct. You're saying all of that, or some of that, or none of that could be due to competitive reasons that are independent of any kind of anticompetitive conduct, and I'm asking you do we need to know is it 2 percent? Is it 98 percent? Is it 50 percent? Is just a finding of harm sufficient?

MS. REINHART: He needs to be able to separate out that which is not caused by the conduct, and I do have a case cite here in my notes, which I will get to, and I will -- with the Court's indulgence, I will provide it as I get to it.

THE COURT: Is that the *Comcast* case? Is that what you're thinking of?

MS. REINHART: It's probably one of them, Your Honor.

THE COURT: Okay. But I guess I'm wondering does that apply at this first step, or does that apply at the second step as it relates to quantifying damages and harm to CSX?

MS. REINHART: So the case that I'm thinking of

actually says that at the causation stage, the expert must be able to segregate the innocent from -- and that's my word, not the case's word -- but the competitive from the anticompetitive. And, again, that is here somewhere in my notes. I apologize.

THE COURT: I'll trust you to find it, when Mr. Hatch is talking to me later, and give it to me. I don't want to take you off your argument.

MS. REINHART: Sure.

Let's move forward, because I think Your Honor has been asking questions that have moved us actually quite quickly through all of the points I was going to make.

What we see in his analysis is that he's got cause and effect backward. In other words, he basically says that because some ocean carriers are -- I'm going to quote -- "primary NIT users" -- those are his words -- they are beholden to Norfolk Southern because they have no choice, they have to use NIT, they have to use Norfolk Southern because CSX allegedly is not there.

And since they're beholden, they have no choice but to use NIT, and their prices are higher. Okay. That's the theory. That's not actually the cause and effect that he should be studying. The cause and effect that he should be studying is to look at the ocean carriers and why do they use one of the railroads or the other? Do they use trucks? Do

they use ports? But why? What are they doing? What are the economic drivers of their decisions?

And if you look at the evidence, certainly what you see is that the carriers choose the railroad before they choose anything else. In other words, the terminals within the port is not something that they choose. I think that we have clear evidence on that point, that the port chooses where a carrier is going to go, whether it's NIT or VIG.

The contracts --

THE COURT: Let me -- while you're on that point, so CSX responds, and I think there's some deposition testimony. That name escapes. I don't know if it was Mr. Capozzi or not, but there was deposition testimony kind of reciting factors that affect where the port steers carriers as they're bringing their ships in.

And if I'm recalling that testimony right, it was that the railroad alignment was down the list of not among the top three or four factors. It was about the fourth or fifth factor.

So how does that align with your argument or affect your argument that the port is making the decision based on which terminal or which railroad it's at?

MS. REINHART: Sure. I don't think it affects my argument, Your Honor. The market shares, if you want to call them market shares, between VIT and VIG are pretty clear.

There's a lot of confidentiality here, so I don't want to say the numbers. They are in the briefs. But the bulk of the CSX traffic is actually at VIG. The bulk of Norfolk Southern's is at NIT, and that's the way the port divides it up.

The share, Norfolk Southern's share at NIT is based on decisions that are made after the carrier chooses Norfolk Southern, if that makes sense. In other words, this is all about what comes first; it's the chicken-or-the-egg issue.

So ocean carriers may choose Norfolk Southern for legitimate procompetitive reasons, but they may end up at NIT because that's where the port sends them, or that's where they want to go, or that's where Norfolk Southern wants them to go.

But what is important is that the model interprets the fact that the ocean carriers going to NIT is anticompetitive, and that's where his model is backward. He's basically saying I'm going to study the effects between Norfolk Southern's pricing and margins and the intensity of usage of NIT, but then he's actually not studying what he says he's studying.

THE COURT: All right.

MS. REINHART: So I don't mean to spend time on this, but the ocean carriers and their contracts with the two railroads don't specify NIT or VIG. They say Hampton Roads.

So that's where they're going. That's what matters to them. That's where they're coming into.

And at this stage, the question becomes why didn't Professor Marvel study the ocean carriers themselves? Didn't speak to them. Didn't ask to speak to them. CSX didn't attempt to get discovery from them. This is really all about, as I've said -- to take you back to the very beginning of my talking here, this is all about the choices and the ocean carriers' choices.

We asked him this in his deposition: "Did you talk to any ocean carriers?"

He said: "I did not."

We asked: "You said that you concluded that ocean carriers were harmed by the conduct alleged in this case. Wouldn't it be a good idea to hear directly the views of the ocean carriers?"

Answer: "I would find that valuable."

But he didn't do it.

THE COURT: This is really more curiosity on my part, but if I accept your argument that legitimate competitive differences are the reason for the pricing results that Dr. Marvel comes up with, why are prices going up?

MS. REINHART: Why are prices going up?

THE COURT: Yeah. You're saying, look, he didn't

consider legitimate competitive factors, and they explain this, and I guess the question I have is, just out of curiosity, why do prices go up under that circumstance?

MS. REINHART: I'm actually not quite sure I understand the question, Your Honor. Are we talking specifically in terms of --

THE COURT: Well, his model says that Norfolk Southern has pricing power and can charge more by virtue of a carrier's intensity of use of NIT, and you're saying, look, that's due to competitive reasons, and I'm asking, well, why are the prices going up under those circumstances?

MS. REINHART: It's a function of the model and the way he designed it, and what Your Honor will see -- and this is in our expert's report. And we're not into a battle of the experts. We don't need to get there, but this is how his model functions.

It's basically to the extent that at any port if there is a set of shippers that rely on one of the two, Norfolk Southern or CSX, and you identify that intensity of use and basically analyze the market the way that Professor Marvel did, you will see that CSX itself has the same issue.

So, for example, if you look at VIG, CSX is -- has high prices, has high margins, is basically in the same position as Norfolk Southern and NIT with the carriers. I can say that a little more clearly.

THE COURT: I understand what you're saying. You're jumping to the damages model, but I understand what you're saying.

MS. REINHART: But it all comes out of the first two models. It's not just the damages model. It comes out of this first model. It's the way that it's designed.

THE COURT: Let me ask you, I guess, since you say that and you make this point, I'm curious what you and CSX have to say about this, but this notion that the models are connected -- are they? Is that really the truth? Because I'm not entirely clear on that. Is he taking something from the first model, the liability and harm model, and plugging that into the damages model --

MS. REINHART: Yes.

THE COURT: -- and if so, what is that? Can you explain that to me? I know he's looking at intensity of use as being a significant factor, but is he taking any part of what he's built into his first model and saying I'm using these results and plugging them into my second model?

MS. REINHART: Yes. The models that show -- the models that show the causation, in his words, actually underlie the damages model. They are built in. They are -- think of it as a foundation. Everything that's done in those first models actually is built into the damages model.

THE COURT: How so?

MS. REINHART: I'll get to my notes.

So his -- in the margins model, basically the dependent variable -- sorry, the dependent variable in the pricing model is Norfolk Southern's revenues; in the margins model, it's Norfolk Southern's profits. The key explanatory variable is the percentage of the carriers' payments to both Norfolk Southern and CSX annually, and he includes the key explanatory variable as being the NIT intensity of use.

And so what this means is that in his initial models, he is basically simply measuring the NIT usage and assigning to that the outcome that -- I'm going to have to start over, Your Honor. I'm sorry. I'm struggling with this.

THE COURT: That's all right. I understand. In the first one, he's saying if a carrier intensively uses NIT, that there's a statistically significant relationship between that and Norfolk Southern's pricing power --

MS. REINHART: That's right. And if you run the same model --

THE COURT: -- as opposed to the same model.

MS. REINHART: If you run the same model at any port, whichever of the two railroads has the better business, the bigger business, you're going to get the same results in that direction. So that modeling is built in. I look at it as a floor built in to the damages model, and it is indeed

dependent on that assignment, if you will, assignment of the intensity of use to the particular railroad. I'm probably not being articulate.

THE COURT: You're talking about the damages model?

MS. REINHART: That's right.

THE COURT: Understood.

MS. REINHART: It is actually incorporated. The model itself is incorporated.

THE COURT: Well, that's where I'm having problems going with you to that step. I'm not sure -- I think he's looking at something -- he's using a similar kind of analysis, but he's not taking the analysis from the first piece and plugging it into the second, is my understanding, and I'm happy to be, you know, proven wrong about that.

MS. REINHART: And perhaps I can help if we -- after the CSX team stands up, but I am having a hard time articulating what I'm trying to articulate. So I apologize, Your Honor.

THE COURT: Let me just ask you. So at least one of the arguments you see in the case law is that if there's a problem with Dr. Marvel's liability or harm model, that the other side's expert would take that same model and just add another independent variable and try to test the results that were obtained.

Did Dr. Wright do that here with respect to the harm

model?

MS. REINHART: Did he just try to tweak it and make it work?

THE COURT: Did he test it by using the primary metrics that Dr. Marvel used to show that the model is invalid?

MS. REINHART: He did a number of things to test Professor Marvel's models, and the most important is that for both of his models, he simply ran CSX experience through the model as though CSX itself were the monopolist that Norfolk Southern is being accused of.

And in our view, that -- there's just no way that you could get those results. They are call spurious results in the economics world. And this is not setting up a battle of experts, by the way. This is simply showing that those results are not reliable at all. They cannot be put in front of a jury, because if you have models, whether it's the effects model or the damages model, and you find effects and you find damages, no matter who you run it against, then a jury simply cannot make heads or tails of what is going on. It's not competent.

There's a lot of evidence in the record, Your Honor, that kind of explains why this is so wrong, the way they're doing it, first of all, and Professor Marvel knows this. We asked him about it. But Norfolk Southern charges the same

prices to ocean carriers whether it's at NIT or VIG; CSX, the same, their prices are the same regardless.

And Professor Marvel wasn't even aware, when we asked him, that that's the case. It's difficult to understand and explain how one of the terminals in Hampton Roads could be the result of anticompetitive conduct and the other one be competitive when the competitors are both charging the same prices there. In other words, you would expect to see -- as an economist, you would expect to see a price differentiation.

And then, of course, we also know that if you run the same models, whether it's the effects models or the damages models, you're going to get the same results. It's designed to get results. The models are designed to show causation or designed to show damages.

Professor Marvel did not consider alternative hypotheses, and that is a fair -- that is *Virginia Vermiculite*, 98 F.Supp.2d, 729 at 736, and that is a large part of our concern about his models, is that they assume the result.

When we questioned him about the fact that his model would show damages in Norfolk Southern's favor at VIG, because it shows CSX as a monopolist, he simply dismissed those results by saying, well, that's because at VIG, CSX has natural competitive advantages.

Now, that's an argument that we've made that he should consider, whether Norfolk Southern has natural competitive advantages that caused the results in the operations of his models, and he says his models don't do that. And his answer, when we asked him about CSX's advantages at VIG, he says: "Sure, they could have an advantage that explains these results." You can't have it both ways.

THE COURT: Is there an argument there that because they both have access via Commonwealth Railway to VIG, that that's a different comparison and, therefore, you're dealing with more of an apples to apples versus NIT where you have -- Norfolk Southern has its own trackage and on-dock access, and CSX has to go through the Belt Line?

MS. REINHART: It's a possibility, and it was not studied. Professor Marvel simply did not study that, so we don't know the answer to that. We don't know the answer to the question whether CSX is actually paying more. In other words, he hasn't studied their costs across these terminals to make a determination whether drayage is prohibitively expensive. Obviously it's not because they've succeeded in gaining share.

He's not studied the relative differences between the costs of accessing VIG, which both railroads do, versus a shortline, the Commonwealth Railroad, and all of the other

ports where he simply says it's cheaper to use the shortline railroad than it is to use the Belt Line. He hasn't done any of that analysis.

Now, again, there were a lot of words in his report that show he's looking at the question, but he's simply reporting the nominal differences between the prices that are paid at the terminals. He's not analyzing the underlying cost, and that is a critical failure.

In fact, there's a case, *H.J., Inc.*, 867 F.2d 1531 at 1539. Without a comparison of relevant costs, the conclusions are meaningless. He should have analyzed the entire marketplace, beginning with the ocean carriers' experience. Were they paying more than they would have if there was not this alleged conduct? He didn't do that.

He should have analyzed the differences between CSX and Norfolk Southern at all of these ports. He didn't do that. He didn't even analyze relevant market. He simply looked at some documents and made a conclusion that the relevant market is appropriately CSX's on-dock access at NIT.

The failures, Your Honor, are undeniable; first, not being able to distinguish between competitive and anticompetitive effects in his effects model, it absolutely fails as a causation model, and then, second, this intensity-of-use problem that we've described in our briefs, those are incorporated into the damages model as well, and

the damages model fails on its own for that reason alone.

Professor Marvel himself conceded that even his most recent iteration of his damages model, which he created after seeing criticism from our expert, does not consider legitimate advantages that Norfolk Southern may have had in the Norfolk terminals that would have affected these outcomes.

THE COURT: Let me ask you about that. He did testify to that, but yet when you read his original report, he seems to say something different. So I'm curious about how and whether those things can be reconciled.

I'm looking at paragraph 88 of his original report, and on the damages side, he says, I did account for things that arguably would have flowed from competitive -- legitimate competitive differences between Norfolk Southern and CSX, and he talks about -- let's see here. It says "the railroad's relative advantages at different ports." He models, let's see here, the relative prices and the lanes.

It would appear that he, at least, took those factors into -- in compiling his dataset from 2009 until, what is it, 2020 or 2019, by the time he got to the reply report, he's looking and banking some of those factors in. I understand what he testified to, but his report seems to suggest something else, and it's kind of an odd disparity.

MS. REINHART: It is, Your Honor, and I think I can

explain it.

First of all, in his original model, his original damages model, even though he does include variables for the various ports and he says that that takes into consideration competitive differences, the flaws or failures, if you were, in the effects model are brought into that modeling. And so they do not -- his using some variables for the ports in the damages portion does not cancel out the problems that are brought in, incorporated in from the effects models.

In his reply brief, when he does his revised model, he cancels out the part of the effects -- the part of the port variables that he included to those shows differences --

THE COURT: Right. He omits the NIT covariant.

MS. REINHART: That's right. And it makes all the difference. It makes all the difference.

THE COURT: He says he gets the same results, that there's a statistically significant relationship shown by his regression model that as use of -- in the second go-round, use of the Port of Virginia or Hampton Roads ports goes up, that the likelihood of alignment with CSX goes down.

MS. REINHART: So, Your Honor, he attempts to solve his problems, and what he says is actually not the outcomes that you see in the model. You still see the same problems. He has a matter of degree in there. But he still has the same fatal flaws. His modeling cannot tell why the results

are the way they are because he does not incorporate any effects models, which are brought in, what he needs to do, to consider whether there's anything out there, in all the reasons that affect pricing, anything out there, other than this intensity of use would affect the price. None of that has changed.

THE COURT: Well, if I'm taking him at his word, he says he looks at ports, network advantages, pricing and builds that into this second regression model dataset. I hear you saying no, he didn't, but that's what he said he looked at. And to some extent, that seems to account for at least some of your arguments, not all of them, but some of your arguments about whether or not he considered legitimate differences. How do you respond?

MS. REINHART: It's tough, because I agree with you the words on the page that he's saying, he's saying that he did these things. But the results contain the same problems. In other words, you run the model on a supposedly competitive port, and you're going to get damages. You get damages in Norfolk Southern's favor, for example. And that continues. That problem never goes away because the models are built to have the output come out the way that it does.

Candidly, Your Honor, I believe that's why CSX has abandoned the relevant market that is defined in the complaint. That relevant market looks at competition within

Hampton Roads. And they define it improperly. We don't have to get there today, but it looks at competition within Hampton Roads, looks at the ocean carriers' options, and all of a sudden Professor Marvel completely changes it, and he designs a relevant market that looks at CSX's options at NIT.

Everything in his modeling flows from that decision. Everything in his modeling flows from, if there's a carrier that uses NIT intensively, it's going to be aligned with Norfolk Southern, and that is what is going to generate so-called effects and damages.

And that is a design decision that he made, and it carries through even his most recent models, and it accounts for the damages -- and I will make finger quotes there -- that are found wherever you look, wherever there's intensity of use. Wherever the carriers that use a port intensively, use one of the railroads instead of the others, you get that result.

THE COURT: Do you want to address the other argument about apportionment and failure to apportion relative to any -- the applicability of any statute of limitations? I don't want to cut you off.

MS. REINHART: I'm happy to go there, Your Honor.

I would say that for the discussion that we've just been having, the *It's My Party* cases are very instructive here, and those cases are about economist work in the context

of relevant market, but it's applicable. It applies across all of the questions that this Court has to decide.

So Professor Marvel's damages model, which is opaque, by the way -- if you or I were to look at it, we would not understand what it's doing. It's opaque. But the model --

THE COURT: I agree the way he explains it is opaque.

MS. REINHART: Right.

So the model is designed to be a unitary damages model. That's one theory. It's the lost profits theory, and the calculation is the same regardless of which year and which damages are calculated and regardless of what the theory of harm is at any given time.

And based on the complaint and the allegations here, the conduct that allegedly harmed CSX changes over time. There's a rate, the NPBL rate. There's alleged failures to move trains on time in 2015. There's conduct alleged in 2018.

And there's more than that, but the point is that regardless of the type of harm that's alleged, Professor Marvel's damages model addresses it in the same way, and that's a problem for statute-of-limitations purposes, and we spent a significant amount of time with Judge Davis on this yesterday. We don't need to go into the legal issues.

But it's a problem for statute of limitations because there's no way for Professor Marvel to segregate harm that results from conduct that's legitimately within the statute of limitations as opposed to being outside. It doesn't do it, and it's not appropriate simply to lop off years of damages to address this failure.

Professor Marvel should have built damages models based on conduct that is clearly within the statute and conduct that may be within the statute, depending on how a court rules, and he didn't do it. But it's more than that. It's not just the statute of limitations at issue here. It's the conduct.

The damages would be different depending on whether CSX is overcharged by the NPBL by paying the switch rate or by having to pay for drayage, which they say is more expensive than access on dock would be. That theory of harm yields a different way of looking at damages from lost profits.

CSX yesterday described loss of reputation in 2015 that caused them to lose business. There's no way that Professor Marvel's models can account for that particular kind of damages, and so what we see is the same methodology year after year regardless of the harm that's allegedly occurring, the type of harm, whether it's within the statute or not, and not depending on anything that's going on in the

marketplace, whether there's an economic downturn or whether CSX becomes more efficient after getting double-stacked, et cetera.

His modeling is exactly the same. It's based on Norfolk Southern's pricing and Norfolk Southern's margins, and what he does is he simply says, but for this conduct, CSX would have Norfolk Southern's experience, and so he calculates the difference between the output -- the output that is in -- based on Norfolk Southern's experience and that which he says CSX should have.

So this is our problem with the damages models, and it's not just statute of limitations. It's terms of identifying the proper measure for the particular harm that's being alleged.

Unless Your Honor has any further questions...

THE COURT: No. I think we'll leave it there for now. Thank you.

I'd be happy to hear from CSX.

MR. HATCH: Would Your Honor prefer --

I don't know, Mr. Snow, whether you're going to argue?

THE COURT: Let's leave the Belt Line arguments for later, maybe, because I know that he does touch on the statute of limitations, but the other arguments seem to be more distinct. If you want to argue on the

statute-of-limitations piece now, we could, I guess.

MR. HATCH: Whatever Your Honor prefers.

THE COURT: Mr. Snow, what's your pleasure?

MR. SNOW: I'm happy to hear from Mr. Hatch first, Your Honor.

THE COURT: Fair enough. Thank you.

MR. McFARLAND: Your Honor, CSX does have a demonstrative handout. I brought copies for your clerks.

THE COURT: Thank you.

MR. HATCH: And hand them to other defense counsel as well.

THE COURT: Thank you.

MR. HATCH: Thank you, Your Honor. Ben Hatch on behalf of CSX, and I won't necessarily plan to march through the demonstrative. I'll try to tailor my comments to the questions the Court has asked and the arguments of opposing counsel, but I will use some of those slides, and I hope it's helpful in the course of the discussion.

Your Honor, I think to begin with, a lot of the argument the Court heard, in my opinion, goes to merits issues, disputes among our expert and their expert, and we have not moved under *Daubert* as to their expert, Mr. Wright, and we certainly don't agree with them.

We certainly don't agree with them, but we understand a lot of the issues that Ms. Reinhart has outlined

are fodder for cross-examination, both, them for Dr. Marvel at trial and us for Mr. Wright at trial.

I don't know if we can get that demonstrative up on the screen. With the Court's permission?

THE COURT: Yes.

MR. HATCH: The Court has a copy, whatever way, of course is easiest to look at, but the first --

Second page, please, Ms. Gollolgy.

This is just -- the Court, I can tell, obviously has been through the record very closely. There is no challenge to Dr. Marvel's qualifications here, just to start with that point, and he is offering opinions in the same area as Mr. Wright.

He is more qualified in the field, I would submit, but in any event, they are offering the same types of opinions with similar economic backgrounds. There's no dispute that use of regression analysis is an appropriate econometric term.

Their only disputes are with certain variables he used or how he went about it. Those types of things Dr. Marvel addressed in his reply report, and I do want to talk about a couple of the issues the Court flagged, but those are classic battle of the expert. It's not a *Daubert* ground to exclude Dr. Marvel. And as we put on the slide here, he testifies frequently and has not been excluded on

Daubert grounds.

I would just say, at a really introductory commonsense level -- and this touches on something that was raised -- there's all this argument "how can we know what's going on at NIT? Dr. Marvel didn't analysis that." Yes, he did. I'll come to that.

But at the most commonsense level, right across the river is VIG, where both railroads have the same rail access through the Commonwealth Railway, and there's vigorous competition. And the Court knows the geography. I mean, it's just across the Elizabeth River. There is vigorous competition there. They have the same access.

On the NIT side, which has a greater capacity -- it's a larger terminal -- there is very little or there's no on-dock rail competition, and the only competition CSX has been able to eke out is through drayage. And at the most gut level, if you want to look at what the market would do if there was not impediments to CSX's access, just look at VIG.

So I wanted to talk a little bit about the contracts with the ocean carriers, Your Honor, because I do think this goes into the market that he has defined. And I'll just touch briefly -- slide 3. And I know the Court has all this law before it, but these are just some pertinent, I think, quotes about the limited function of *Daubert*.

If we go to slide 4. So Dr. Marvel did look and

observe, of course, that there are five carriers who use NIT extensively for 80 percent of their business, but he didn't stop there. But this is data. This isn't opinion. This is data that shows these carriers use NIT extensively.

Their, I think, first argument they raised, Your Honor, is there's VIG, there's other ports, they can go anywhere, it's all the same. But the data shows that these carriers use NIT extensively, they use it over time, and Ms. Reinhart told you these contracts that are entered into are three- to five-year contracts, and so when the ocean carriers are contracting, they are doing that ex-ante.

They don't determine -- and the Court referenced Mr. Capozzi's testimony. They don't determine where a ship is going to call one week later, or three years later, between VIG or NIT. So they have to contract in the ex-ante world, and what they know in that world is, of course, NIT is a huge capacity, it's always going to be a huge capacity in Hampton Roads, and so they have to account for that when making their decisions. And that shows naturally why -- and there's other evidence of this that Dr. Marvel talks about, but that's naturally why it's important to them whether you can service that capacity.

I'll come back to drayage, but of course, drayage -- and Dr. Marvel examines that. Drayage, it's not just whether you can get from point A to point B. It's whether you can do

it efficiently and in a timely fashion.

And an example -- when there's a merger, for example, when two airlines want to merge, DOJ will define the market as flight routes between Washington, D.C., and New York. Right? That would be a relevant market if two aircraft companies wanted to merge. There may be other routes that are relevant markets, but that would be a relevant market.

You can drive from Washington to New York. You could walk from Washington to New York. You can take a boat. There's other ways to get there, but the fact that substitutes exist does not mean that you don't have a relevant market for customers who demand that service. And at the core of what Dr. Marvel is talking about is there are customers who demand service at NIT that's well supported in the record and that underpins his market definition.

THE COURT: Would it be fair to state, or is it your argument, that Dr. Marvel's analysis is that they're not functionally interchangeable?

MR. HATCH: That's correct. And he did look at -- you have to take your customer where you find them. And in his report, which I know the Court has been through multiple times -- don't take our word for it -- NS's own documents say we don't tell our customers -- and this is in Dr. Marvel's report -- we don't tell our customers where to move their

freight. They tell us. They come to us with an ROP. They say you need to move this much freight through these destinations. You have to service that. You don't say, gees, we'd love to have your business, but we need you to move that projected freight up through a different port.

That's not how the market works, and that's what he looked at, and it supports that there's not -- for the business that we're in, which is moving intermodal freight by rail, there are no substitutes when there's this level of demand among this level of customers at a particular terminal.

THE COURT: But to go back to my question, my question was relating to drayage and rail transport of containers. Is it Dr. Marvel's opinion that they are not functionally interchangeable?

MR. HATCH: Yes, Your Honor. Yes, that's right. I mean, these two businesses are competing for rail service, and sometimes, to listen to Norfolk Southern's argument, it sounds like they wish they were in the trucking business.

But the documents in the discovery and what Dr. Marvel replies on are replete. There is not -- drayage is not viewed as an adequate substitute for on-dock rail, and the port says that too. The ports say they want on-dock rail as well. Virginia wants that.

THE COURT: Just while we're on this point, because

it relates to relevant market -- I don't know, this may be relating to Mr. Snow's arguments, and Belt Line's argument just a little bit, but did Dr. Marvel conduct any kind of analysis, or do you concede he did not conduct an analysis of the cross price elasticity of demand?

MR. HATCH: Between drayage and the on-dock rail, the way he looked at it, he did not do a specific cross elasticity of demand. What he looked at was is this an effective substitute for on-dock rail, and he evaluated it in terms of capacity, in terms of timeliness, and just -- and this is in his report, but I think this really hammers it home. Mr. Wright says you can move, I think it's 100,000 and change containers, you know. We disagree with how much you can move by drayage. But if you took -- if you granted Mr. Wright's assessment --

THE COURT: Is it Dr. Wright?

MR. HATCH: I apologize. Dr. Wright.

THE COURT: Just so the record is clear. I don't want to sell him short on his education.

MR. HATCH: I apologize to Dr. Wright.

If you took the total, even his number, which we don't agree with, it wouldn't even amount to one of the customers that Norfolk Southern has a year at NIT. And they have all of these customers.

In other words, even if you took their best case

scenario, we couldn't even move one of their customers' annual NIT freight through drayage. That is a capacity limitation that inhibits you from competition.

And another thing Dr. Marvel says is the fact that the port has to subsidize you to even use an inferior means of access is not evidence of equality of competition. In fact, that's evidence of what the monopolist has done, that the port is helping you to even get in there through drayage is not evidence in their favor. It's evidence of how effectively they have excluded through on-dock rail.

The Court asked some questions about Dr. Marvel's accounting for procompetitive -- you know, competitive analysis and his deposition, and I would like to turn to those. It came up a couple times, and I think maybe I can do it together.

THE COURT: It might be helpful -- and I want you to turn to that, but it might be helpful if we just keep the discussion first on the liability model and then talk separately about the damages model, but I'm happy to hear you.

MR. HATCH: Sure. Well, first of all, to the extent the Court has questions, returning to liability, about whether he could use qualitative findings, he certainly can. I did not hear any case that says he can't make qualitative assessments. He's extremely experienced in the field of

economics.

The way his assessment works is he looks at the market, he looks at alternatives, whether it be other ports, whether it be trucking, whether it be drayage. He looks at all those things and makes an assessment that on-dock rail service at NIT is a relevant market. That his experience. It's based on literature that guides that experience. Then it turns to the impact on the ocean carriers and that regression analysis.

And I'll just turn -- I don't know if the Court has a copy of the report in front of it --

THE COURT: I do.

MR. HATCH: -- I may reference.

THE COURT: Paragraph 80?

MR. HATCH: Yes. You got it. You beat me to it. Thank you, Judge. Paragraph 80.

So here's where he's building the regression for assessing damage to the ocean carriers through the increases of price, and the part I wanted to point the Court to in this one is he says toward the end of that paragraph "I also include a measure of the proportion of the ocean carriers' traffic that goes through NIT in each calendar year to proxy for the leverage generated by CSX's lack of on-dock access at NIT and NS's resulting pricing power."

And this is in addition to other factors, lanes --

Ms. Reinhart talked about differences in market over time. That's discussed also in this paragraph, but I draw the Court's attention to that part because that is factoring in a measure. So I already observed anticompetitive conduct within the market at this point in his assessment.

And so what he's saying is let me see if there is a price increase, and he's factoring into his calculations this proxy for the bargaining power that would be the result of the anticompetitive conduct he's already discussed.

THE COURT: And that proxy -- tell me if I'm wrong. Is that the independent variable, the percent of traffic at NIT? Is it the same thing, or are we talking about something different?

MR. HATCH: Yes. This is the proportion. So what he's doing is saying this -- it's a proxy, which is allowed in regression. You don't have to have a perfect variable for every situation, but he's using it to say, okay, if you are a heavy NIT user, you are -- it's a proxy. You are more beholden to Norfolk Southern, who is engaging in the anticompetitive monopolization; and, therefore, what effect does that have on your prices?

So, to me, this is critical. They can argue it's not a good proxy, maybe he should have used some other proxy, but this is a proxy that brings into his ocean-carrier harm assessment what you would expect to find. Right?

I mean, he talks about that earlier. If you monopolize, you expect to find increased prices, that would be my expectation, I apply this, I find, in fact, a controlling for other factors, including route -- he says that earlier -- container size, whether they're loaded or empty, and the lane travel; for example, Savannah. So he's accounting and holding those variables constant as well as the size.

So I do believe his harm to the ocean carrier assessment does have a proxy for the anticompetitive effect that he's observing.

THE COURT: Well, I guess that's the question, because then he's asked -- I guess to take it to the next step, he's asked at deposition does your rate regression model account for also legitimate competitive differences or distinguish between them, and I'm not -- it's at Page -- in the 150s in his deposition, and he says no, I don't try to sort out where the responsibility lies.

And so the question -- I think Ms. Reinhart's argument is that he has to factor in causation into the harm regression model, and he hasn't done that, and that's a reason to exclude him. How do you respond to that?

MR. HATCH: That's great. Thank you. I'll go right there, Your Honor.

So what I believe he was saying in that deposition

testimony -- and then we also have his reports, of course, that cover this. And if you read his reply report, there's a difference between -- and what he's trying to measure, first he determines relevant market; on-dock, NIT. Okay, what is the effect within that market?

He builds his models to measure the effect within that market at NIT, and so when he says I didn't measure procompetitive. He's talking about specific to NIT versus the competitive differentials across the networks that may pertain.

In other words, to put it differently, he's trying to focus and isolate the NIT effect. So he's saying it would be relevant if there was a procompetitive difference at NIT specifically, and I think that's what he's addressing. And in his reply report, he says I'm surprised because Dr. Wright didn't identify any procompetitive justification for the behavior where it's analyzed. I have no procompetitive explanation for what we're analyzing. The only explanation is, well, they should just go somewhere else; they should service other ports, they should drive trucks, whatever.

They offer no procompetitive justification that is specific to NIT. Procompetitive justifications that apply across the network are accounted for by virtue of the lanes used. Right? So to take an example -- and some of this also applies to the damages model. I'll try not to repeat on

these things.

But, you know, certainly to certain destinations in the Midwest, one carrier or the other may have a relative advantage; you have a shorter route, you can get there faster, that sort of thing. They have differential pricing.

But that is all, if you will, west of Hampton Roads. They have their lines. Once you pick up from VIG or NIT, both carriers are going to consolidate and go on the same lines on their own track out to those destinations. So when he's saying they didn't give me any procompetitive justification specific to NIT, so that's what -- there's been none identified, and so that is not what is built into his analysis.

And I think we see that, as Your Honor already indicated, in paragraph 88 -- excuse me, not 88.

THE COURT: I think that's the damages model, though.

MR. HATCH: Right. On the damages model --

THE COURT: It looks like -- I don't mean to cut you off, but it looks like his damages model analysis and what he bakes into that dataset is different from what he's doing on the harm model.

MR. HATCH: There is some difference. And Your Honor also asked about whether the first model is an input to the second model at one point, and my understanding is that

they share some variables that are input to them; for example, the degree of NIT usage variable.

THE COURT: Is that the only one they share, though? That's sort of my understanding, is that that's really the only thing they share, and he kind of, you know -- that intensity of use is a product of revenues going to NS and CSX for container traffic.

MR. HATCH: They certainly share that. I'm trying to think what other ones they might share. I'm not sure I have a comprehensive list, Your Honor. They do also look at different lanes, but I do think they look at those differently in the two models, because the purpose of the first model, as the Court is well aware, is we're looking at whether there was harm to the ocean carriers, right? To Ms. Reinhart's point, you know, the antitrust laws don't protect -- the protect competition, not competitors.

And no -- I didn't hear a case, and I'll be interested if she has one that says you have to quantify that to a specific dollar amount. Maybe if you were a carrier claiming damages, of course, in that suit you would want to do that for your damages, but you just need to show harm to competition.

THE COURT: Do you have a case going the other way and, also, a case that he can make a qualitative judgment as an economist about this anticompetitive effect? I'd be happy

to have those as well.

MR. HATCH: Okay. I may follow up in a second with those, Your Honor. I think the fact that experts can make qualitative judgments I think is right in the heartland of *Daubert*, and I'll be happy to follow up with a specific case on that.

THE COURT: Let me ask you about that. I want to follow up on this first, the harm model, because in his deposition he says, well, there's obvious anticompetitive effects, and he's asked about this, well, what about the fact that Norfolk Southern had double-stacking? What about the fact that Norfolk Southern has better routes out of Hampton Roads? What about CSX service issues, if you will, that he talks about?

And he says, well, those things, they may apply, but they all sit beneath this anticompetitive problem, and that has kind of the ring of being sort of ipse dixit. What is the Court to make of that, this damage or the liability phase when he says that? Because he's asked, well, it's obvious, and these are all things that could be variables, but the big one is this anticompetitive thing. I hate to reduce it to that, but to some extent, that sounds like what he's saying; "well, this is the big problem." Well, what is that based on?

MR. HATCH: Right. And I think this is where, Your

Honor -- the cases say, first of all, for *Daubert*, regression analysis and the econometric analysis, you can always fight about whether there should be another variable that's put into the analysis, and they don't need to be perfect, they need to be defensible to go to the jury. So I just start with that standard.

They have not come forward with a variable. They say what you need to do is say I found the variable that, if applied to your model, destroys it. And that is what they've not done. They've said there could be this, that, and the other possible things, but they haven't come forward and established that.

THE COURT: I don't think that's correct. Dr. Wright doesn't challenge Dr. Marvel's model on its own terms as it comes to liability.

MR. HATCH: And I think that's really the end of the analysis for *Daubert*.

THE COURT: Except for this question of causation. Does his model take into account causation?

MR. HATCH: It certainly does. And the way it does that is by virtue of his analysis of the anticompetitive conduct within the market that he's found, which I think is very defensible, and then he looks to determine whether there has been an impact on ocean carriers, and in this regard, he does quantify it. He does find a price increase for ocean

carriers that use it intensely.

And the connective tissue I would make to Your Honor's point about causation is he's using that degree of use there coupled with his assessment of lack of substitutes, which he otherwise lays out in both reports, as a proxy for the increased bargaining power of Norfolk Southern by virtue of the exclusive conduct.

Would you touch on that point about whether or not he needs to put a number on it? Ms. Reinhart says he does, and you say no, he doesn't.

MR. HATCH: Yes, Your Honor. It's an element to show that there's been harm to competition in the relevant market. I don't think you -- that is to the ocean carriers. We agree on that part. It's not -- damages are with respect to CSX. That's why there is different models for those two analyses.

But harm to competition -- first of all, I think it's patent. I mean, I go back to the commonsense thing, which is also in his report. You can see the difference in competition between these two immediate terminals, and you can also see -- I've got another very interesting set of charts, which is in his reply report to this point about whether there is substitution among all the East Coast ports, and I want to stay on Your Honor's question, but on Pages 23 and 24 of his reply report, he's got a couple of graphs that

show -- there's differential pricing between New York, New Jersey, and Hampton Roads, and that seems to persist even over differences in volume. You would not expect to see that, right, if these things were ready substitutes.

You do not expect to see this type of differential pricing that is reflected. They have to move -- ocean carriers decide to move a certain amount of freight through -- or international intermodal freight through NIT, and that is where we have to find the customer.

What we find is a percentage of the market there that Norfolk Southern has that is indicative of monopoly power. They have stratospheric percentage of that service at NIT, and then you look to see through his model whether that -- there is also what you'd expect to see, increased prices, and he finds that.

I don't think it's necessary -- that's the -- that supports the harm to competition. It is not necessary that it be a perfect calculation for it to go to the jury.

And I would just cite the Court to the *Conwood Company* case, which is in the briefs, at 794. "In order to be admissible on the issue of causation, an expert's testimony need not eliminate all other possible causes of the injury."

And so -- and this is really where I think there's the dynamic between the two reports. This was his

assessment. They did not come forward with a procompetitive justification to measure. And as Your Honor already indicated, they said, no, you should look at the larger VIG as well, the Port of Hampton Roads terminals. He did that, and he still measures the effect, because the market power of Norfolk Southern across those would still meet the relevant thresholds, even across the two ports.

Unless Your Honor has any -- let me look over my note here, if you would.

THE COURT: Please take a minute. I'm going to look over my questions as well.

(Pause in the proceedings.)

MR. HATCH: Your Honor, just to give a cite to a reference I made earlier, I talked about don't take our word for it, Norfolk Southern's own analysis shows they need to serve their customers at these different locations, and that's in Paragraph 32 of Dr. Marvel's report.

I'll turn to the apportionment issue now, unless the Court has any other questions?

THE COURT: No. That's appropriate.

MR. HATCH: Thank you.

So as Ms. Reinhart said, this did come up extensively yesterday at the summary judgment hearing, and I suppose there is overlap. They make similar arguments here. I really don't think it's, the first point, a *Daubert*

challenge to say he didn't apportion his damages appropriately with the statute of limitations, but they do make the argument.

The case I would direct the Court to is the *Zenith* case from the Supreme Court, which the Court is likely already familiar with, and I'll just read from the *Zenith* decision.

So the issue is -- to step back before we go into *Zenith* -- if you have a claim that could have been brought outside the statute, which is, for antitrust purposes, four years, so let's assume 2009 for sake of argument here.

If you could have brought a claim in 2009 and you didn't bring one until 2018, can you get damages for the statutory period of the ongoing monopolization or conspiracy that is within the statute, question one; and, question two, do you need to try to apportion those damages, pull them out between something that could have happened from outside the statutory period, or do you get all of your damages?

So *Zenith* is a monopolization case from the Supreme Court, and what they say very clearly on Page 333: "We confront the issue of whether it is consistent with the controlling limitations statute, 15 USC Section 15b, to permit *Zenith* to recover all of the damages it suffered during the years 1959-1963" -- I'll say parenthetically that was the four statutory years -- "even though some

undetermined portion of those damages was the proximate result of conduct occurring more than four years prior to the filing of the counterclaim. HRI contends, and the Court of Appeals held, that the statute permits the recovery only of those damages caused by overt acts committed during the four-year period." That is their argument. "We do not agree." U.S. Supreme Court.

In that case, they got their four years of essentially market profit. Our market share would have been this but for the anticompetitive conduct. That is our manner of calculating damages here as well.

They got the full four years because the Supreme Court says you don't have to try. And part of that is the nature, and this goes to a case I'm sure they'll discuss, the *Claire* case, which comes later from the Supreme Court. You've got to look at the underlying nature of the cause of action to explain these cases.

In *Zenith*, it is monopolization. Monopolization hurts you every year the monopoly is maintained. That is the word of the cause of action; "establish," "maintain" a monopoly. So not just when it starts but also as it's maintained. Our businesses want to compete every day. They want to compete fairly and hard. Every day that you maintain the monopoly, you are causing the damages of that monopolization.

We recognize if they assert statute of limitations at trial, you may not be able to get the damages that are outside the four-year period, but the damages from that monopolization that occurred within the four-year period under *Zenith*, you certainly can.

The other point I would say about *Zenith*, if you go to the 341 to 342 range, they explain why that is, and why that is, is because if you brought your suit -- let's say in this case we brought our suit in 2009, when this first rate was set, could we have claimed damages up to 2022? We could have, maybe. But they would say that's all speculative. Tomorrow, we could abate this rate and change everything. Ms. Reinhart will tell you the dynamics -- the market's dynamic, it will change.

So looking forward, what do you look forward over, 10, 20 years? How long will the conduct continue? You don't know at the beginning. After the conduct has occurred, the Supreme Court says now you have a record of what the market shares were. You can have experts talk about what the market share should be, and you can apportion that within the statutory period. That's just what we've done here.

Just a quick note on the *Claire* case. *Claire* is a civil RICO case, which does use the same statute of limitations. It does not purport to overrule *Zenith* in any respect. In fact, it relies on *Zenith* for the Clayton Act

analysis as pertinent to the RICO cases there. But the difference is in the cause of action and in the underlying harm.

In *Claire* they bought a silo on day one. That silo was alleged to harm those plaintiffs over the course of its life. They got bad grain out of it. And so you suffered an injury on day one that had predictable ongoing results to you from that day forward. As long as you kept putting grain in that silo, it would be bad grain, et cetera.

They tried to bring it within the statute, because of course under RICO you need a series of predicate acts. And they tried to use predicate acts even though their purchase of the silo was outside the statute. They said, ah, but there were sales to other farmers of silos. There were advertisements, even though we had already bought ours. That's in the statute, that should be allowed to bring it in.

And what the Supreme Court said is, no, you can't bootstrap. Your injury occurred at the beginning outside of the statutory period, and the fact that, you know, you have to show RICO predicates and you can find a predicate that's within the statute, that wasn't injury to you.

That's critically different from what we have here where over our entire statutory period, the injury is very much to CSX not being able to compete on fair terms and have access to NIT.

So that's the capsule on apportionment. I'm happy to answer any questions the Court may have.

THE COURT: I don't think I have any additional questions relating to that. Thank you.

MR. HATCH: Thank you, Your Honor.

THE COURT: All right. We have been at it for a good while. Would this be a convenient time to take a break? Maybe we can see if we can get the air conditioning turned up a little bit in here as well.

THE COURT SECURITY OFFICER: Yes, Your Honor.

THE COURT: Thank you.

We'll come back and take up the Belt Line's motion.

Is 1:30 okay? Is that enough time for people to get lunch and come back and be ready to go?

MR. HATCH: Yes, Your Honor.

THE COURT: Great. Thank you very much. The Court will be in recess.

(Recess from 12:42 p.m. to 1:32 p.m.)

THE COURT: Okay. Mr. Snow, if you're ready to go, I'm happy to hear from you.

MR. SNOW: Thank you, Your Honor.

May it please the Court, Your Honor, Ryan Snow on behalf of Norfolk and Portsmouth Belt Line Railroad Company.

Your Honor, I have four things to talk about in our motion. I'll do my best not to repeat the brief, but the

four things -- and I'll put them in an order so that I can pick up on the discussion that you were just having with Mr. Hatch. But damages, they are overinclusive; drayage, they don't consider costs; our rate, they don't properly analyze it; and then I had two specific liability opinions that I don't think Dr. Marvel can express.

So if that order works for you, Your Honor, I'll start with damages.

THE COURT: Please.

MR. SNOW: The fact is that the way Dr. Marvel has created his model, they have no damages that they can establish in this case, and that's because this case is controlled by the *Claire* decision in the United States Supreme Court. And I know Mr. Hatch told you *Zenith*. Let's look at *Zenith*.

Well, *Claire* cites *Zenith*. *Zenith* remains good law. It's a different case, though. *Zenith* is a forward-looking case. It's about accrual, and you look forward if your damages are too speculative at the time that an overt act starts. And potentially, in the future when the damages culminate, your cause of action then accrues, and then you can sue.

Well, there's a reason they call it the *Zenith* exception. And if you look at all of the antitrust case law, it's called the *Zenith* exception, because the real rule is

that in order to have damages that are actionable, you have to have not only an overt act within the statute of limitations, but it must cause some new harm over and above whatever old harm you had. And that came to a head in the *Claire* case. We cite that in our brief. *Claire* is 1997.

And I should point out that although Mr. Hatch didn't mention it, another case that he cites in his brief is called *Lower Lake Erie*. They put a great deal of weight in *Lower Lake Erie* from the Third Circuit, a 1993 case, four years before *Claire*.

And Your Honor probably noticed, in the *Claire* case, although it was a RICO case -- even though it's a similar RICO case, the Supreme Court said they were basing their decision on the Clayton Act antitrust law, because that was the backbone for the RICO statute.

And what they did, and it's poignant here, they rejected the rule that was being used in the Third Circuit for accrual issues where there are acts that were caused -- I think they called them late-occurring acts.

And what *Claire* does is it says, okay, if you can prove that overt act in furtherance of a conspiracy which causes new harm over and above the previous harm, you can potentially recover for that, but you cannot use that as a bootstrap to recover for harm due to acts before the statute of limitations.

The Court is clear about that. The commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period. And it says "generally" because the Court recognized there is a *Zenith* exception, where if you don't know your damages, if it's a rare circumstance where they just can't be known, you may be able to get around that rule, but that's not the case here.

There is no representation at all that back in 2009, when CSX first thought all of this was happening, it couldn't have sued then, and Dr. Marvel could have come up with the same model he's come up with now back then. There's been no representation that that wouldn't have been possible.

And so --

THE COURT: Let me just ask you a question about that. I probably should ask Mr. Hatch this question as well, but he can perhaps follow up.

If we -- the complaint takes you back four years to 2014, and this new alleged conduct giving rise to an accrued injury is 2015 but the injury results from the same type of exclusionary conduct, can you get damages back to 2014, even though this new conduct, you know, that kind of breathed life into the alleged antitrust conspiracy started in 2015, under your analysis of the cases?

MR. SNOW: Well, not under *Claire*, Your Honor,

unless you could show some new harm over and above that previous harm that you indicated. But their damages model just doesn't do that. I can't do that for them here. I have to deal with the damages model that they created, and the problem is the damages model they created, it's almost described in *Claire* because *Claire* says that the plaintiff there could have alleged a new overt act within the statute of limitations.

Hypothetically if they did it, would that help them? The Court says no. That's Page 190 of the opinion, and what they say is it wouldn't have helped them because their damage model didn't identify any new harm, quote, over and above any existing harm that they had.

That's our case. That's the machine that Dr. Marvel has built. I view it as one of those Dr. Seuss-type machines where you put in a lot of data and, pop, here comes a number out of it, right? We only get one number. There's no telling what went into that number in terms of damages causing certain acts.

And there's no dispute about this, I should say. Dr. Marvel himself says that the number he comes up with for each year is due to the totality of the defendant's conduct. We pressed him on that, and he was candid about it, that's what it is.

And it's undisputed, I'll submit, Your Honor, that

that number that he churns out for even the four years that are within the statute of limitations, for each of those four years, it was undisputed that that number includes some damages due to acts outside the limitations period, some amount due to acts inside the limitations period.

And I say that because -- and I'll point Your Honor to this reference -- in the defendant's summary judgment opposition brief -- it was a consolidated brief. It's at docket entry 328. If you look at Page 49, they discuss the damages that went into each of those years. And this is what they say, quote: "Most of these occurred in years after 2013," within the limitations period. "Most of these damages."

And of course, the unstated admission there is that some of these did not. And so we have the problem of a single clump of damages, if you will, that contains amounts due to acts inside the statute of limitations and acts outside the statute of limitations.

And the problem of confronting that model against the *Claire* decision from the United States Supreme Court becomes obvious when you try to figure out what does "most of those damages" mean? Pick a year. 2017. "Most of the damages were due to acts inside the statute of limitations." Well, how many? Was it 90 percent of the damages that year? Was it 7? Was it 63? Nobody knows. I don't know. The

Court won't know. The jury won't know. And that's why the damages model breaks down.

THE COURT: Is your contention, then, if we just tease this out a little bit, that if a contract -- CSX did not get a contract in 2012 that Norfolk Southern got and that was running five years, that the damages or the lost profits associated with that contract would run into the statute of limitations, and we don't know how to account for that in looking at Dr. Marvel's numbers?

MR. SNOW: It could really be any number of things similar to what Your Honor is talking about. It couldn't be that, I will tell you that, because we propounded an interrogatory in this case that asked them to identify the overt acts that they rely upon to show the conspiracy. That example Your Honor gave is not one of the overt acts.

But, for example, one of the overt acts is removal or discontinuance of a track called the Diamond Track, right, in 2008.

What portion of the harm that they suffered in 2016 was due to removal of that Diamond Track versus other acts? No one knows because the machine, the model that Dr. Marvel built doesn't tell us, and that's no shortcoming on the defendants. That's the way they built that model on the plaintiff's side.

And I submit, Your Honor, we cited a case in our

brief, the *Gumwood* decision from Indiana. It's a district court, but it's really squarely on point, and that's 2016. It explains *Zenith*. It explains *Claire*. And it says that the expert in that case, who did just what the expert did in this case, must be excluded because you can't present that kind of model to the jury and just tell them to guess.

THE COURT: Didn't he just come up with a lump-sum number and say -- he came up with the real Dr. Seuss number. Here's one number, and it applies to all of the conduct associated with these competing shopping centers and whatever misdeeds were committed.

MR. SNOW: Absolutely. He did that.

And I'll concede the machine here looks a lot more complicated than his machine, but the end result is the same. It pops out one number, and there's no way for the jury to tell what's in it and what's not. And the concession I read to Your Honor from their summary judgment brief makes that clear.

Some damages are okay, some damages are not, even if you accepted that they were legitimate damages, and that's the defect, and that is why we moved to exclude on that point. And I raised that first because I think that's fatal to the whole model.

Unless Your Honor has questions, I will talk about drayage.

THE COURT: Let's talk drayage.

MR. SNOW: Yes, sir. Drayage is another issue that I believe breaks the machine, and this is why I say that:

One of the components of Dr. Marvel's model, one of the things he had to do that they hired him to do was define the relevant market. And Ms. Reinhart knows much more than I do about relevant markets, but I know two things. The relevant market has two components. It's got a geographic component, and it's got a product/services component.

So here, for example, Ms. Reinhart described how the geographic component has shrunk dramatically. It started Port of Virginia. Then it became Hampton Roads. And now in Dr. Marvel's report, it's just on-dock rail access at NIT. It doesn't even account for VIG right across the water.

I'm not explaining that defect. I know she has already done that. But where I get to the defect is the product/services component of the relevant market, because his conclusion, in order to make the machine operate the way it does, is that drayage is not a reasonably effective substitute for rail.

And of course we cited the case. It doesn't have to be a perfect substitute. It has to be a reasonable substitute. His conclusion is that it's not, but he doesn't do the homework to make that conclusion admissible.

And we pointed to the *H.J., Inc.* case. This is out

of the Eighth Circuit. It's in our brief, but it's 867 F.2d 1531, and the discussion is really at 1539. This is a 1989 case, and they talk about the relevant market. It's actually a case about submersible manure pumps. I have never seen one, and I don't want to, but it was a big deal in that case.

The plaintiff tried to define the market. There were a lot of other kinds of pumps that these farmers could use out in the northern Midwest. The plaintiff tried to define the market as just that submersible pump. And he said, functionally just this submersible pump is not like these other things, so it's really its own market.

And the Eighth Circuit said -- rejecting the expert's analysis, they said, hang on. You never accounted for cost. You never accounted for the price of this thing. How can you do your cross elasticity of demand analysis without accounting for cost? And so they rejected that opinion.

And the language of the case is telling here: Without a comparison of relative costs, their conclusions of one product's superior or inferior quality are meaningless. I added "inferior," because that's kind of what we have got here. But they go on in the footnote.

"The question of relative costs is not merely academic. It is an essential consideration of any rational

purchaser," here the dairy farmer, "in making the decision to buy one product over another."

THE COURT: What if that submersible pump, you know, the alleged substitute could only pump 5 gallons a day, and the other pump can pump 10,000 gallons a day? Does that make a difference?

MR. SNOW: It probably does. It doesn't excuse not looking at costs at all. I don't know any case that would say that that functionality difference excuses not looking at costs at all.

THE COURT: Well, let me ask you about that because that was -- we touched on this a little bit earlier I think with Ms. Reinhart and Mr. Hatch, about that question. There's two components of that. One is, you know, functional interchangeability. The other is cross elasticity. And as I understand CSX's position, Dr. Marvel didn't look at costs. It seems not much disputed, so the question is, you know, can they ride that functional interchangeability horse across the finish line to say that's sufficient to make a judgment that these are not reasonable substitutes?

MR. SNOW: I don't think you can, and I'll tell you why. Because consider our rate, Belt Line's rate. When he evaluates the Belt Line's movement of trains to NIT, what does he evaluate? He evaluates the cost of the move. That is what he evaluates to determine whether that's

anticompetitive or not. He's looking at the cost of the move.

So when he looks at reasonable alternatives in the market, there's no way to ignore cost of the move. That's his central component for analyzing our move. It's got to be his central component for analyzing theirs. So what has happened is we're being judged against a mode of transport with a complete blind eye to the price, when we know price matters because CSX uses it to the tune of many, many, many railcars each year. I'm trying to be sensitive to the confidentiality, but we put that in our brief.

And we also know that there's an arrangement there which indicates that the cross elasticity of demand -- it's a very high indicator that it exists. These two modes of transport are interchangeable. And, frankly, I could add a third point, which is there's a reason they call it intermodal transport, because it can be transported by multiple modes of transportation.

So I think, like in the Eighth Circuit case, his analysis that turns a blind eye to that cannot be admissible. His market definition fails on that ground.

And I point, Your Honor, just for support for that point, not only to the Eighth Circuit case, but to the *Sardis* case. We cite that a couple of times in our brief. That came out of the Fourth Circuit in 2021, so just last year.

And it's not an antitrust case, I know, but it's about experts. It's a product liability case.

And what the Fourth Circuit said there is that if an expert turns a blind eye to something that is essential to his analysis, that should be excluded. It's not a matter for cross-examination. It should be excluded. And so the expert in that case, for example, he was an accident reconstruction expert. It was about garage doors and containers that's held them. And Your Honor probably saw on Page 291, they talk about this.

He failed to test his theory. He had a theory about why the design was wrong and what could have been better. He failed to test it on an actual container. He failed to create a computer model of the container, even though he could have. And the defendants even gave him three offers of creating some exemplar for him. He said, no, I don't want those. He purposefully ignored something that could have tested his model.

And I think the analogy here is that Dr. Marvel purposely ignored cost, even though he found it to be a central component in evaluating our rate, and that is why we move to exclude his opinion on drayage as a substitute for rail.

Unless you have questions, Your Honor, I would like to talk about his analysis of our rate itself. We take

serious issue with his comparisons of our rate, and I described in our brief him having some liability-like opinions and having some damages-like opinions. And I realize he's an economist, and there's a lot of leeway given to economists to testify on certain things that relate to their economic opinions. But I will tell you, even with that kind of leeway, they still have to meet the foundational requirements of *Daubert* in Rule 702.

And there are three reasons why his comparison of our rate doesn't work: He compares it to private rates, not public ones; he doesn't control for differentiating factors; and he totally ignores our costs.

And the end result, and I'll get into each of those, but putting yourself in our position, we are being judged by private contracts that we have no idea exist -- they're attorneys' eyes only, so my client hasn't even seen them -- with no consideration of our costs, and no consideration of differences between our railroad and the railroads we're being compared against. That's how Marvel did his analysis.

And I submit to you, Your Honor, the *Laurel Sand* case supports us here. That's the Fourth Circuit case, District Court in Maryland, and it involved railroad rates. And they said an inquiry into the reasonableness of a rate must focus on the rate's reasonableness in the context of competition rather than from the plaintiff's perspective.

So if you dig into Dr. Marvel's report, you'll see that he does have some rates in there that he compares ours against, the key one being Commonwealth Railway.

Now, the public tariff rate for Commonwealth Railway is 210. Our rate is 210. Our rate is actually cheaper because it only applies to loaded containers. Commonwealth's actually applies to loaded and empties, right? So depending what you are shipping, you could save money over the Belt Line, all other things being equal.

But he doesn't evaluate our rate against that because that would break down his machine again. He evaluates it against the private contract rate that CSX has. He does the same thing with the Port of Mobile. The Port of Mobile has a $240 tariff, above ours, and yet he doesn't evaluate our rate against that. Inexplicably, he evaluates it against only CSX's contract rate.

And so he concludes in paragraph 58 of his report, NPBL's switching rate is strikingly higher than the switching rate that the Commonwealth Railway charges CSX.

Well, that would be news to the Belt Line, because they can't benchmark themselves against contract rates they don't know about. And what is more, we don't know how the contract rates that he points to came about. We have some information on Commonwealth's Railway, but what about the Port of Mobile? What was given in exchange for that? Does

that railroad offer the same rate to anybody else besides CSX? Because that's where they need to show a market, right, not just what they pay.

And so what we end up with is a series of railroads that we've been compared against that the Belt Line doesn't know, and that we don't know the terms for, and that don't indicate anything about the market. That's the flaw on the comparison to private rates.

THE COURT: Did you all do discovery to try and sus that out about whether there were market differences, or whether CSX was exerting its market power to get special rates?

MR. SNOW: Well, that's the other defect here, because Dr. Marvel didn't know. He doesn't know that information, because all he was given was the raw number, right? And so I'm not going to do his homework for him necessarily.

THE COURT: But you're making an argument that could be construed as simply fodder for cross-examination, and then suggesting that you need to know what the markets were relative to these other rates to say that they're not comparable.

MR. SNOW: I mean, if the methodology crossed the threshold in the first place, potentially that would be the case, but there's no case law that supports the idea that in

the context of identifying a market rate, you can look at only the plaintiff's own private contract rate. So I don't think we will get to the point of me needing to cross-examine him.

The problem becomes really stark when you think about even the other public railroad rates that he used. What's the difference between those railroads and ours? Do they have cost differences? Is the mileage different on the track? Mileage is very important in these things because acquisition, construction, maintenance of track is very expensive, and it bears on the rate. He compared none of that.

You will see in our expert, Thomas Crowley, he does control for the mileage.

Dr. Marvel took numbers that they gave him, and he compared it. There's literally no methodology at all. And then perhaps the worst thing is, and I say this because he's an economist, he completely ignored the money. He ignored our cost of providing the services.

And if he had considered our cost, if that had gone into his analysis like it should have, he would have found that, like Thomas Crowley did, our cost over this 10-year span, from 2010 to 2020, is about $219, $220, depending on if it's weighted. And of course our rate is 210. And if you go to the *Laurel Sand* decision, they actually say rates set at

cost is reasonable.

So adding together the aggregate of all those failures, I'll submit to Your Honor, this is not a matter of cross-examination at all. This is a wholesale failure of the expert to do the homework that he really needed to do if he wanted to determine whether our rate was reasonable because everything else indicates that it is.

If Your Honor has questions, I'll be happy to answer them, but if not...

THE COURT: No, I don't.

MR. SNOW: My last points, Your Honor, and these are two opinions that he expresses that we call railroading opinions. They are in paragraph 59 of his opinion.

One opinion he says, NS and NPBL have impeded CSX's en banc access to NIT by removing critical infrastructure --

THE COURT: The Diamond Track.

MR. SNOW: -- so the decision to remove that critical infrastructure -- yes, sir, that's the Diamond Track.

And then the other one is in 2015, when he expresses an opinion in the same paragraph that the scheduling windows provided to CSX-T essentially were not adequate.

I think no matter how you slice those, they come down to decisions made by railroaders about railroad operations. He's not a railroad expert, so he fails on

qualifications, and he admits that, but he also fails on foundation and methodology for both of those because -- and he conceded this, really, in his deposition -- he barely knew any of the facts about either one. He asked for it. He was given only what he was given. But he didn't have even the basic information to make those determinations.

And so what I don't want, Your Honor, is for him to sit on the witness stand in front of the jury and say, "In my expert opinion, they did a bad thing by -- they made a bad decision by removing that track." "They made a bad decision by offering these particular windows." It's not something he can do.

And I think, if I may, to help the Court appreciate my concern, imagine -- I'm not presupposing anything -- but imagine if he didn't have his damages opinion. Imagine if that got excluded. Could he still say these two things? Could they still call him as their only expert and say, Dr. Marvel, I want to ask you about these two railroading things. What is your opinion on whether these were good ideas? I think the answer is certainly no. The answer is certainly no. And if it can't stand up alone, there's no reason that it should stand up just because he also has a damage opinion.

That's all I have, Your Honor, unless the Court has questions.

THE COURT: I don't. Thank you, Mr. Snow.

MR. SNOW: Thank you, Your Honor.

THE COURT: Mr. Hatch.

MR. HATCH: Good afternoon, Your Honor. I'll try to follow the order of Mr. Snow, if that works for the Court.

THE COURT: Please.

MR. HATCH: So he started with the statute of limitations. I've already touched on that. I'll try to only talk about what he raised.

We could not have generated this model in 2009. We wouldn't have had the historical data about exclusion and relative market share, and it would have been viewed as speculative in 2009, because you were looking forward. I mean, that goes back to the point I made.

So then what would they concede in 2009, that we could have asked for 30 years in the future of damages? Would they concede now that we could ask for 30 years in the future of damages because we brought a timely action now for at least the last four years? I really doubt it. They would say, oh, you don't know what could happen. We could lower our rate, shipping lines could shift, they could build out a bigger, even bigger expansion at another port. That's all speculative.

And that's what *Zenith* is talking about, and that's the case I rely on. And you, I think, have heard very little

from them about the *Zenith* case. It's directly on point, never been overruled in the antitrust context, and they can't address it. They can rely on *Claire* which doesn't overrule it in any respect.

There's an additional case I would direct Your Honor to, it's the *Poster Exchange* case, which is from the Fifth Circuit, a 1975 case. And if the Court would permit, I'll just cover a couple of the points in *Poster Exchange*.

In antitrust cases and monopoly cases, you get your damages going four years back for the monopoly that operates during that time, and that was -- Your Honor said I should ask Mr. Hatch for that. You get your damages for the full monopoly going back four years.

THE COURT: In this case, that's your argument that if you prove an overt act, and let's say it's the 2015 alleged conduct, that you get to go back to 2014 and collect damages? Is that CSX's position?

MR. HATCH: Correct, Your Honor. You get all of the damages that were within the statutory period, and that's because unlike -- let's say I take a pill, and that pill I allege harms me, and I say maybe it harms me over a course of ten years. My damages are all flowing from the one event of taking the pill, and they are projectable out for ten years.

In a monopoly case, each day, each year that monopolist is maintaining the language of the statute,

maintaining their monopoly position, and the damages that flow from that flow to customers, and they flow to -- they flow to competitors who can prove their damage, and that damage is from the exclusion. That exclusion -- and the exclusion that happened in 2014, 2015, 2016, did not happen in 2009. They could have decided to cease that monopoly behavior at any time in between.

So that's the difference. Your cause of action, maintaining the monopoly, is occurring each year. And yes, you may not be able to get the damages that are more than four years old, but within that four years, you get the whole set.

And with *Poster* --

THE COURT: I guess the question that follows from that is, is that true if the 2015 conduct gives rise to an injury that's separate, apart from the old exclusion back in 2009, or the pricing, the rate issue in 2009?

MR. HATCH: Well, the way I would answer that, if I understand Your Honor's question, is the conduct complained of is monopolization or conspiracy to monopolize. There are different ways you can affect that, right? One way we have alleged is through the prohibitive switch rate. In 2015, what we saw is during a time of, you know, unprecedented port congestion, when we actually tried to pay their rate and get into NIT, they slowed our trains down. They wouldn't do them

on a timely basis, and therefore not only are you paying that exorbitant rate when you try it, but you're not getting timely, effective service, so that's a new aspect. You can't even get the operating windows. You can't get in there in a timely fashion.

But those are just different aspects of what the monopolist is doing. The monopoly is to maintain that monopoly position at the port. You can do that through a high rate. You can do that through lack of operating windows. You can do that through renegotiating a new trackage rates agreement, which is another act we have in our summary judgment. And you can do that through not agreeing to our 2018 rate proposal.

So the monopolist is monopolizing, and they are doing that through any effort to get in there, and that is why your damages are the damages that flow from being precluded in that time that the monopolist is precluding you from the market.

The *Poster Exchange* case, and I don't know if the Court has that case handy, but I --

THE COURT: I don't.

MR. HATCH: Okay. This one may, I don't recall, may have been cited in the summary judgment briefs as opposed to in the *Daubert* briefs. I apologize if Your Honor doesn't have a copy. We can certainly tender one after the hearing.

I'd give you mine, but it's marked up, so it's probably not best.

THE COURT: That's fine.

MR. HATCH: It's *Poster Exchange versus National Screen Service Corporation*, 517 F.2d 117, 1975.

So it comes out fairly soon after *Zenith*, and it actually talks about how *Zenith* had changed the rule in the Fifth Circuit, which had not allowed you to recover your whole set of damages.

But it starts with -- the discussion I want to begin with is on Page 126, and it talks about the *Hanover Shoe* decision from the Supreme Court. There the antitrust defendant had exercised its monopoly power since 1912 to force the plaintiff to lease and not buy its machinery at monopoly rates, but the plaintiff did not sue until 1955.

The Court held that the antitrust action was not barred by the statute of limitations with respect to the period 1951 to 1955, because "We're not dealing with a violation" -- this is quoting Hanover now -- "We're not dealing with a violation which, if it occurs at all, must occur within some specific and limited time span upon" -- and it cites a case there, the *Emich* case -- "upon which the defendant relies. Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on the

plaintiff." And that is exactly where we are in this case.

And that was also an exclusion case, and it allowed the exclusion damages for, again, that four-year statutory period.

Just to read another passage from it, and now I'm on Page 127: "Here, *Poster* complains that during the four-year period sued upon, it has been continually injured by Columbia's and National Screen's conspiratorial foreclosure of *Poster* from access to supplies. Under *Zenith*, we are obliged to recognize *Poster's* continued accruing cause of action during this period. Moreover, aside from the conclusive effect of these authorities, any other result here would, we think, improperly transform the limitation statute from one of repose to one of continued immunity." And that's a key concept.

Under their argument, because they successfully monopolized starting in 2009, and were not sued, they get to continue monopolizing into the future forever and not face damages from the monopolization that occurred earlier, and that's what *Poster Exchange* and *Zenith* say you can't do.

One last point on the statute of limitations. We're not trying to recover for old damages, and by "old" I mean damages that would be outside the four-year period. We realize if they assert the statute of limitations at trial -- and I think they need to assert it -- we may not be able to

recover for those damages that are outside the statutory period.

Mr. Snow talked about a statement in our summary judgment opposition where we said most of these damages are within the statutory period, and that reference is not to saying that our damages are somehow mixed with the earlier damages. As Your Honor knows, Dr. Marvel calculated damages on an annual basis. And what that reference was in our summary judgment opposition is that most; i.e., the biggest volume of damages, if you look at the chart, are within the statutory period.

So there were smaller -- he calculates smaller amounts of exclusion damages in the early years. The largest volume of damages were within the statutory period. So I wanted to be clear about that. We're not saying the damages are mixed. They are calculated by year and could be presented that way, if they assert the statute-of-limitations defense. And within those years, those are new damages for exclusion. Each year, that's business that you did not get to do under Marvel's methodology that you should have gotten to do due to the monopolist conduct.

I'll transition to drayage, unless the Court has any questions about the statute.

THE COURT: No, I don't. Thank you.

MR. HATCH: Just quickly on drayage, because I think

Dr. Marvel did discuss this fairly extensively in both of his reports, Your Honor. Mr. Snow talked about cross elasticity of demand, and Your Honor pointed out there is the functional interchangeability, which certainly there is not, and Marvel analyzed that and concluded on that.

With regard to cross elasticity of demand, and here I'm looking at the *FTC versus Sysco Corporation* case, 113 F.Supp.3d 1. It discusses on Page 25 to 26 -- for the cross elasticity of demand, I agree he did not do that analysis from a pricing standpoint in his report.

But the only thing I wanted to say about cross elasticity of demand is, of course, price is one element that can go into cross elasticity of demand. But as this, the *FTC* case says, price is not, however, the only variable in determining the cross elasticity of demand between products. Cross elasticity of demand also depends on the, quote, "ease and speed with which customers can substitute the product and the desirability of doing so," unquote.

Thus, substitution based on a reduction in price will not correlate to a high cross elasticity of demand unless the switch can be accomplished without the consumer incurring undue expense or inconvenience.

So that goes back to the point he has analyzed that drayage is just not an adequate substitute, as he lays out in his report, because it can't substitute for what you could do

with on-dock rail.

Briefly on the rate issues that Mr. Snow talked about, to the extent there's any argument about discovery there, I don't -- this has all been disclosed, so I'll put that one to the side there.

With regard to *Laurel Sand*, which he talks about that you, kind of, per se, you can charge a rate that covers your cost, this is just a fact dispute for trial or perhaps ships passing in the night. They say 210 covers our cost, and they've got evidence on that. That's fine. We have proposed lower rates for the NIT service. And don't take our word for it, every time we propose that, the Belt Line itself analyzed it and concluded that it would make money on that rate.

And this is also in our summary judgment papers, but in 2009, NPBL itself proposed the $75 rate for a unit train, a train traveling on one waybill, and it said it did that after assessing other similar rates charged by other belt lines for similar services, and it considered NPBL's worst case for cost. That's Exhibit 19 to our summary judgment opposition. So that was its own proposal originally on the 75.

CSX said we'd like to use the 75 for the service to NIT, and the president of the Belt Line, Mr. David Stinson at the time, assessed that the proposal would earn NPBL $85,000

in operating income, which were Exhibits 34 and 35 to our summary judgment opposition.

And the Norfolk Southern board members on NPBL said have you really thought about that enough? Maybe you are really not thinking of a worst case financial situation, I believe trying to send a message, you shouldn't be saying this rate won't work.

And Mr. Stinson, to his credit, reported back that NPBL would earn net income. Part of the proposal then was that they could even use our trains. You can just use our power. You don't even -- trying to make it easy for them. And Mr. Stinson said whether or not we use their trains, we'll still make money. That's Exhibit 44 to our summary judgment opposition.

And then in 2018 Ms. Donna Coleman at the Belt Line assessed that the 2018 proposal -- she said she did a back-of-the-envelope whether an NPBL 1,500 in net revenue per trip, excluding supervisor costs, and that's Exhibits 5 and 8. So -- and that's fine.

They can argue about that, but every time the Belt Line has looked at whether the rate we proposed would work, they have always concluded they would make money. That's part of Dr. Marvel's analysis. You would expect a business that is not operating in a competitive exclusive environment to adopt proposals that make it money.

THE COURT: Does he simply rely on the Belt Line's analysis relative to the 2018 proposal? And, I guess, Mr. Snow's critique is he never sort of crunches the numbers himself to kind of, you know, talk about marginal costs and how they would go down with volumes and so forth or relies on, I'm sorry, CSX's analysis in submitting these proposals as well?

MR. HATCH: To my knowledge, Your Honor, no one has ever assessed that the Belt Line would lose money on CSX's proposals. Even their own Mr. Crowley says, well, I think they'd make less money than what you've projected. Okay. You know, we can, I guess, fight about that. Nobody has ever said they would lose money.

The argument that they would lose money from the Belt Line is this, and I think it's important, as I understand it: We're not saying we'd lose money at the rate CSX has proposed for NIT service. We're saying we would lose money if we took that rate and applied it to our entire network.

THE COURT: Right. It's the uniform rate argument.

MR. HATCH: It's the uniform rate argument. That's an argument about the merits of what they can do, but it's not an argument that for the service we proposed and the rate we proposed, they would make money. Everyone has said that. Our proposal said that, NPBL always said that, and that's

what Dr. Marvel is relying on.

THE COURT: But did Dr. Marvel ever do any kind of analysis if you lower the rate uniformly, what the net result is going to be?

MR. HATCH: No. He did not because there's no need to do that. Before 2009, when they raised that rate to 210, there was a differential rate for service to NIT, and it's called an import/export rate; so intermodal. Okay. That's part of this conduct we're complaining of, is they had differential rates before. Now they would tell you we can only have one rate, it's got to be across everything. That's fine. That's a litigating position for them. We can have that out at trial.

Historically they had different rate for it. Then they raised the general rate to 210. And that's fine. CSX was okay with 210 if there was 75 for the NIT service, but then that's where the problems happen, that they said, no, we're just going to do 210 generally, and that was the exclusive -- you know, that was the beginning of this.

THE COURT: Talk to me about -- I don't want to cut you off there, but I'd like to hear briefly on the Diamond Track. I think Mr. Snow suggested that Dr. Marvel did a little more than kind of spitball it and pretty much admitted that he didn't really explore the facts in any meaningful way to conclude or opine as an economist that the Belt Line and

Norfolk Southern impeded CSX.

MR. HATCH: Yes, Your Honor.

THE COURT: What is your response to that?

MR. HATCH: My response to that is that the expert report summarizes both his opinions and the bases for those opinions, and I agree he's not a railroad expert. He's an economist. And he's looking at conduct over the whole course of this and assessing whether that conduct is part of -- there's a relevant market, but also whether it's preclusive or monopolistic conduct.

And so in doing that, he takes input from facts, right, in the trial. He will sit and watch the witnesses, and when he sees things that strike him as being inconsistent with separate action, right, conspiracy, why would the Belt Line not take an offer that makes it money? Right? Perhaps it's part of exclusionary conduct.

So, to me, the Diamond is just one of several events he identifies that are consistent with exclusionary conduct, and he bases that not on his own independent assessment of the history of the Diamond, but he bases that on fact testimony that we anticipate adducing at trial, and we'll opine about that what would mean from an antitrust or economic standpoint.

THE COURT: Thank you. Is it true that CSX wasn't using the Diamond interchange before it was discontinued?

MR. HATCH: I believe that is true, at least for the immediate time frame, Your Honor, and I'll check that in a second. If I'm wrong, I'll report that. I don't know how far back historically that goes.

THE COURT: I think, and Mr. Snow can correct me if I'm wrong, but I think the assertion was that it hadn't been used for a couple years. Is that correct, Mr. Snow?

MR. SNOW: That's correct, Your Honor.

MR. HATCH: That's correct. I mean, part of this is that we've never, during the life of this, been effectively able to use their service for NIT, and this was an early act that contributed to it becoming, what later was clear, a less effective service by virtue of the conspiracy and the monopoly.

THE COURT: Now, there's been some contention also that CSX representatives on the Belt Line's board voted in favor of or did not object to the discontinuation of the Diamond Track in 2008, or 2007, I guess the end of 2007. Is that correct?

MR. HATCH: Yes, Your Honor, and our position on that is that things that at the time you did not identify with collusive or monopolistic behavior could have been part of that, and we've found in discovery -- I'm sure the Court may have read our complaint. The complaint, I would say, is focused on the recent events, and we found in discovery

there's a ton of evidence from earlier years about Norfolk Southern's plan to just block us at every step of the way.

And so, yes, I think we can put on evidence from earlier years about things that were a part of a plan that you learned about through discovery, and they'll say you voted for it, and that's fine, that can be, again, something that would be presented at trial, in my view.

The other, I guess last point, I kind of touched on it, or Your Honor did with the Diamond, is he is not offering railroad opinions. He's not offering operational opinions. He's taking facts from other witnesses and saying what that means from an economic perspective.

And so his report recites that evidence repeatedly, but that would be evidence about those that, again, would be presented at trial, and then he can opine about what that means from an economic perspective. That's how we view the testimony as coming in.

Unless the Court has any further questions...

THE COURT: Nothing. Thank you.

Mr. Snow?

MR. SNOW: Just three points quickly, Your Honor. The first one is I understood Mr. Hatch to describe their motion for summary judgment quote that I read to Your Honor to say that it meant something that I didn't interpret it to mean, and if that's correct -- I'll take his word for it if

that's what they meant.

I don't think, however, that it changes the analysis because Dr. Marvel himself, of course, says that each year of damages reflects the totality of the defendant's conduct, and that really goes back to 2009 under his analysis.

So point two is, based on that, it's not a *Zenith* case. It's not a *Zenith* exception case. Mr. Hatch said they couldn't have sued back in 2009, like I suggested, because they wouldn't have had four years of data at that point. Well, if that's true and you needed four years of data, why didn't you sue in 2013 after you had four years of data?

They didn't. They waited until 2018, and we are squarely in the teeth of the *Claire* case as a result, and *Claire* says you cannot recover for old acts outside the statute of limitations. That is the rule, and that is what their model tries to do.

Point three. There were discussions about the rate, and what we think of the rate and what other people think of the rate. Those are arguments for trial, for sure, for CSX. But they do not excuse Dr. Marvel's failed methodology. We're here on a *Daubert* motion. The focus is his methodology and his analysis of our rate, and he failed in the sense that he compared it with private rates that are only for the plaintiff. He used no controls for differentiating factors, and he didn't explore costs or examine them whatsoever.

Those are failures at a *Daubert* motion on his methodology.

THE COURT: Thank you, Mr. Snow.

MR. SNOW: Yes, sir.

MS. REINHART: Your Honor, may I answer the Court's earlier question and make a few more points?

THE COURT: Very briefly. It's getting late. We've got to get to Mr. Crowley.

MS. REINHART: To answer Your Honor's question about cases where a court found that you have to quantify causation at the time of the causation analysis, the cases I was thinking of are not at the narrow analysis of causation.

They are analyses of damages and causation at the same time, and so the quantification that I'm thinking of was actually the Court taking down the quantification of damages because the entire set of models that are used to identify both causation and damages cannot tell whether there is causation or to the extent there is causation.

And that's what we have with Professor Marvel's modeling. He has separate models, of course. He has effects models, and he has a damages model. He has not jettisoned those effects models. They are still required for him to incorporate into his damages model, and so that's part and parcel of his damages. The damages model itself cannot tell us if there is causation or to the extent to which Norfolk Southern harmed CSX. And we know this.

We talked a bit about the difficulty with his testimony and his report not being clear and what he did in his revised report, but, Your Honor, we know from Dr. Wright's supplemental report that when you run the VIG analysis, just as Dr. Wright did against Dr. Marvel's original model, you still get damages in favor of Norfolk Southern in that revised model.

So the inherent NIT demand problem is still built in. That variable drives damages, and it still drives damages in the revised damages model. And for that reason, the whole thing has to go.

And counsel himself, Mr. Hatch, made very clear today before the Court that VIG is competitive and NIT is not. None of Professor Marvel's models show any sort of damages for anyone at VIG, and the fact that they do just makes the point that I made earlier.

The reason that we have this problem is because Professor Marvel got his process backward, his cause and effect backward. He started in his process, his analyses to look for where there's a conspiracy.

In the complaint the allegation was a market consisting of Hampton Roads, all of the terminals there, and he couldn't find conspiracy there so he said, no, the relevant market would be NIT, or that's where the conspiracy was.

Then he asked the question, where's the harm? Well, there's not harm at NIT. There's only harm because CSX doesn't have on-dock access to NIT. And we see that because CSX successfully drayed at NIT. So the harm has to be from the lack of on-dock. As a result, that's the very narrow relevant market that Professor Marvel chose. His reasoning is circular.

THE COURT: I think I get that point.

MS. REINHART: I would just cite *Virginia Vermiculite* for that proposition that he did not consider alternative hypotheses, and that's what his circular reasoning shows.

THE COURT: Thank you, Ms. Reinhart.

All right. It's 3:30. Are we ready to jump into Mr. Crowley?

MR. SNOW: Yes, Your Honor. Alex McDaniel will be arguing the opposition. It's your motion.

THE COURT: I'm going to ask you to focus on the main points with respect to Mr. Crowley.

MR. HATCH: Your Honor, this is Ms. Peterson from our Richmond office who's going to argue.

THE COURT: Thank you.

MR. McFARLAND: We have a handout, Your Honor.

MS. PETERSON: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. PETERSON: Ashley Peterson, again, on behalf of plaintiff CSX.

And, of course, as you know, this is our motion to exclude NPBL's expert, Mr. Crowley. I know we've talked a lot about many issues that bear at least somewhat on Mr. Crowley's opinions, as well as Dr. Marvel's. So I'm happy to answer questions and go to the points that you're most interested in, but I will just take a quick second, and if we flip to the second slide.

The Court is, of course, very familiar with all of the law on Rule 702 and *Daubert*, but I'll just flag for you that we view this motion differently in that this is squarely a question of whether the analyses that Mr. Crowley has performed are based on a reliable foundation and whether they are relevant to the questions that the jury is going to be asked in this case, and especially whether they're going to be helpful on any of the facts that are at issue and whether they actually provide expert opinions that are outside of the common knowledge of the jurors and that would actually be helpful to them.

So happy to talk a little bit -- we talked a lot about the assessment of NPBL's rates and what Mr. Crowley did versus what Dr. Marvel did. I just want to note that Dr. Marvel -- of course, Mr. Crowley is responding to Dr. Marvel when he assesses NPBL's rates, and he's responding

in particular to Dr. Marvel's assessment that NPBL's rate is extraordinarily high in comparison to the other rates charged for similar services by other switch lines and that NPBL could have made money at a lower rate, right, under CSX's proposals.

I know we've already talked about all of that, so we don't need to go through it all again. But just to flag, the analysis of that rate needs to be from the perspective of the party paying the rate, right. So in this case it would be CSX.

Mr. Crowley's rate analysis --

THE COURT: What do you mean by that? I'm not sure I understand.

MS. PETERSON: So -- I actually think I'll take that back. I think it's a point I'd like to make in terms of drayage instead. Apologies. I've got a Post-it note that went in the wrong place.

So, first, with respect to the rate, our position is that Mr. Crowley's rate analysis is not premised on any coherent, reliable methodology that's within the scope of his experience. And as the Court knows, Mr. Crowley is experienced in the railroad industry. He has a lot of experience assessing rail rates at the STB, which uses this defined formula to determine whether or not a rail rate is reasonable.

We all agree that that formula doesn't apply here, and we all agree that Mr. Crowley didn't apply it. The issue is that Mr. Crowley hasn't identified any other coherent guiding principles to apply in assessing the rate instead. All he's doing --

THE COURT: That's the question I have, and I understand you're suggesting that this isn't exhibiting real expertise, but I have a hard time thinking a jury could pull this off, and part of being an expert is trying to figure out where is the data? What do I collect? What do I need to look at? How do I make these determinations about the number of cars? And I guess I'm skeptical that that's something that a jury could just break out their calculators in the jury room after trial and say, all right, we're going to get to the bottom of this.

I sort of feel like this is within the wheelhouse of an expertise, particularly an economist and someone who has extensive experience in the rail business or looking at railroads and their work product.

MS. PETERSON: So if I understand your question correctly, I do -- I take your point that the jury should not be expected to just go back into the jury room with a bunch of data and try to figure things out on their own. But what Mr. Crowley did here, if you -- it's in his report at Pages 4 and 5. I've also reproduced it. It's on slide 3 of the

materials.

So what Mr. Crowley did is he took the high-level summary expense figures from NPBL's annual reports, and he added up the totals of these broad categories, things like materials and other, right, and then he divided that by the total of number of cars that NPBL moved each of those years to come up with a cost per car.

That's just addition and division, and it is also presumably the kind of thing that NPBL management undertakes in the ordinary course of business and certainly something that NPBL's fact witnesses would be perfectly able to testify about at trial in terms of the figures in their own annual reports, the number of cars they moved each year.

So they -- there are certainly ways for the NPBL to put that evidence in, assuming they're able to lay a proper foundation, which I have no reason to think that they wouldn't be able to put on a witness at trial to do that. And they can put all of that evidence in without it having a guise of expert testimony when really all it is is adding things up and then dividing.

The other point to make there is that Mr. Crowley, in doing this, doesn't take into account at all whether some of these summary-level costs are variable costs or whether some of them are fixed costs, and I know you've seen this, and we've talked about it some already today, so I won't

belabor the point too much. But the issue here is not simply whether NPBL's rate is reasonable in a vacuum or whether it's calibrated to cover its existing costs.

The relevant question, in terms of whether or not the rate is set high to further the anticompetitive conduct, is whether NPBL could have lowered its rate to, say, a level that CSX had proposed in one of its proposals or the $75 unit train rate that you heard Mr. Hatch talk about earlier and could have moved the traffic to NIT at that lower rate while still covering its costs and earning additional revenue.

And without any assessment of whether some of those costs are variable, there's no way to know the answer to that question because, of course, as fixed expenses decrease, the number -- fixed expenses would decrease as the number of cars interchanged increased. I won't belabor that if you feel -- if you're familiar.

THE COURT: I don't think I need any more on that. Thank you.

MS. PETERSON: Sure.

And, again, we've already -- of course, Mr. Hatch has already talked about this as well. But on slide 5, there's plenty of evidence that any time anyone has assessed that question, the answer has been that NPBL could do so.

And then we can talk a little bit about rate comparisons. I know that Mr. Snow talked earlier about

criticisms that he has about the comparisons that Mr. Marvel makes to Commonwealth and to other railways, and, of course, this is where I want to insert my point here, which is that when we're assessing the rates that are being charged in the marketplace, in terms of whether or not the markets -- in terms of the relevant market, the question is whether the consumer -- what is the rate the consumer pays in the market?

So in this instance, the question is what does CSX pay? Right? What is actually being charged to CSX when it is obtaining switching services from these various switch lines? So the criticism that we should not be looking at a contract rate just doesn't hold water in terms of the antitrust market analysis because what matters is what CSX is paying.

THE COURT: Or presumably other railroads at any location, right?

MS. PETERSON: That could be relevant as well, potentially.

THE COURT: I guess the point is, if I understand your point, if you're getting the same service, which is switching railcars, that it doesn't matter whether it's a public tariff or a private contract?

MS. PETERSON: Yes. Exactly. What matters is the rate that is actually being paid for those switching services. So that's why, looking at the rate that is

actually paid at Commonwealth, which, by the way, at the time of the -- when the rate at NPBL was changed to 210, the Commonwealth had the tariff rate that was significantly lower, and that is laid out in our summary judgment briefing as well.

But the contract rate is, of course, lower, and that's true not only at Commonwealth, but, of course, as Mr. Snow pointed out, at the Port of Mobile as well, which Mr. Crowley doesn't take into account on his report Exhibit 4 where he's comparing the various rates.

So if you take a look at Exhibit 4, which is on slide 6 of the chart, and, of course, you also have it in Mr. Crowley's report -- let's see. The six comparators at the top of the list, meaning all of those that are less expensive than the Belt Line, those are all the shortline railways that Dr. Marvel looked at, and the reason that Dr. Marvel selected those is because the record evidence shows that those are the switching railroads that CSX uses for international intermodal container traffic.

The other railways listed from 9 down were selected by Mr. Crowley as additional comparators, or I think you may say that there are additional comparators or better comparators or ones that Dr. Marvel ought to have considered.

The problem is that these are misleading and unreliable comparators. First, for the first several, Port

of Galveston, Brownsville or Port Jersey, none of those switching railroads move any appreciable amount of intermodal traffic. So they are simply not comparable to NPBL or the other terminal switching railroads cited by Dr. Marvel.

For example, the Port of Jersey, or the Port Jersey rail, which is listed as a part of Port of New York/New Jersey, all the intermodal switching in New York or New Jersey is done by Conrail. There is no dispute about that. And the Port Jersey rail provides mostly barge service across the Hudson River and also provides some limited rail switching services to local warehouses right in that immediate area.

So it's certainly not a comparator for the switching services that are being provided by NPBL and for that international intermodal traffic that's traveling from the East Coast ports to the Midwest destinations.

As I mentioned, the record reflects CSX doesn't pay the tariff rate at Port of Mobile. So it has a negotiated contract rate similar to what it has with the Commonwealth. There was no discovery done on that, and Mr. Crowley didn't ask whether CSX pays the tariff rate for any of these comparators. He didn't ask what those contractual rates were, but the record shows that the rate that CSX pays at Port of Mobile is significantly less than the listed tariff that Mr. Crowley uses in his comparison.

Then the last thing that I'll flag there is that Mr. Crowley adds $10 to the rate charged by the Commonwealth Railway. He flags that in the third footnote of his Exhibit 4. He cites that as covering locomotives and fuel, but he doesn't give us any justification, doesn't cite to any basis for why he thinks that those locomotives and fuel, which CSX provides pursuant to the contract with Commonwealth -- he doesn't offer any basis for why that should result in a $10 upcharge on the contract rate. And the evidence in the record shows that it's actually much lower.

THE COURT: I don't want to -- I don't think I need to hear any argument on the historical events. If you want to touch briefly on the drayage, I'll be happy to hear you on that.

MS. PETERSON: Sure. Absolutely.

Can I make one more point on the rate comparison? Apologies. Very briefly, Your Honor.

THE COURT: Sure.

MS. PETERSON: I just wanted to note quickly -- and this is in our briefing so I won't go into detail, but Mr. Crowley cuts down the NPBL's rate slowly, right, by saying, well, it should be assessed on a per-container basis, and then it should be assessed on a per-container, per-mile basis. He doesn't really offer any justification for why

that would be appropriate to do.

The evidence that we do have in the record suggests that shortline railroads generally don't assess their rates on a per-container, per-mile metric. They assess -- or excuse me, their costs, they assess them on a per-shift basis.

And he also has a bunch of incorrect assumptions in terms of making -- conducting the analysis of NPBL's rate on a per-container basis. He uses 2.5 containers per rail. We've laid out in our briefing, and Dr. Marvel lays out in his reply report, that that's just not possible under the facts and the realities of the industry.

Nearly 70 percent of intermodal containers are 40 feet long, which can only be stacked, at most, two to a well. And on top of that, of course, as has already been discussed today, CSX didn't gain double-stack capacity out of the Port of Virginia until December of 2016, and that's a fact that's publicly available. It's a fact defendants have relied on extensively, but it's one that Mr. Crowley was unaware of and didn't take into account.

I'll turn to drayage, if that's okay with you.

THE COURT: Please. Briefly, though.

MS. PETERSON: Of course.

So -- just trying to think of how to be most efficient in this.

Mr. Crowley's opinion that drayage is fungible with on-dock rail depends solely on the economics of the move. He briefly -- NPBL cites in their opposition papers a general statement in his deposition that he considered operations, but there's no evidence in his report suggesting that he considered any of the operational issues that impact drayage and limit its ability to be a reasonable substitute with on-dock rail.

And Mr. Hatch talked about a lot of those. I don't need to go into all of them in detail, unless you have questions about any of them.

THE COURT: No, I don't.

MS. PETERSON: Okay. So the primary way that NPBL has attempted to salvage this opinion on drayage is by suggesting that the cost, the lower cost, allows -- well, what they claim to be a lower cost based on the VIT subsidy creates a situation where drayage is cheaper and so, therefore, that's why CSX uses it.

There's no evidence in the record from any CSX witnesses or any VIT witnesses that that's the purpose of the subsidy or that that's the reason that they used drayage.

The testimony in the record shows that the subsidy is intended to make drayage tolerable, right, so that there can be some level of competitive access at NIT. The reason that the Port of Virginia has attempted to -- has provided

the subsidy in an attempt to create that dual access is because the port recognizes how important it is, but it is woefully inadequate in terms of an actual substitute in the market.

So first, in terms of an analysis of cross elasticity of demand, Mr. Crowley is not an antitrust economist. He has no experience conducting that kind of an analysis, and he made no real effort to conduct that analysis here. You've already heard from Mr. Hatch about the fact that he didn't consider any of the non-operational factors that -- or, excuse me, non-price factors that go into the unsubstitutability of drayage.

And then I'll just flag that in order for drayage to be a reasonable substitute, it would have to be a substitute at the competitive price level, right, and Mr. Crowley makes no effort to determine what the competitive price for drayage would be absent defendant's conduct, and he also makes no effort to explain how CSX can access and use drayage without undue expense or inconvenience. He ignores the gate hour limitations, he doesn't discuss the limited availability of chassis or the volume issues that we're already discussed today.

So without doing any of that, he doesn't offer an opinion that is at all helpful in terms of cross elasticity of demand.

I'm happy to answer other questions, but I don't want to take up too much more time.

THE COURT: I don't have any other questions. Thank you, Ms. Peterson.

Why don't we take a brief break now. It's 10 of 3:00. Let's take 15 minutes, and we'll pick up from there. Thank you.

(Recess at 2:49 p.m. to 3:12 p.m.)

THE COURT: Good afternoon.

MR. McDANIEL: Good afternoon, Your Honor. Just let me know when you're ready.

THE COURT: I'm ready.

MR. McDANIEL: May it please the Court. My name is Alex McDaniel. I represent the Norfolk Portsmouth Belt Line Railway Company.

CSX makes three arguments in support of its motion to exclude Crowley. All of those go to the weight of his testimony, not to admissibility.

First, they discuss his qualifications, but there really is no serious dispute over those qualifications, so I'm going to jump right to his rate opinions.

CSX said that Mr. Crowley has no method or methodology with which to judge the rate, but he does. It's got three parts to it. The first part is he compared the Belt Lines' 210 rate to its average operating expense per

container annually from 2010 to 2020 and also compared that rate to the ten-year average.

Second, he compared the Belt Line's 210 rate to other switching railroads using a per-container, per-mile metric.

Third, he confirmed those conclusions of one and two by analyzing the Belt Line's purpose and history, namely, the Belt Line's Operating Agreement.

While this doesn't fit into CSX's case in chief, the reason why it's important is that it goes directly to the Belt Line's procompetitive justification at NIT in that its undisputed costs justify its rate.

CSX argues that Crowley did not identify any authority for his methodology to evaluate the rates' reasonableness. The 702 does not require Crowley to pull his methodology from a textbook or an industry publication. He can and did rely on his experience in the railroad industry, which is voluminous.

He testified that it's a common and accepted way to do that, and there's -- he had testified also in his deposition that he used that same methodology in a federal case in Texas in 2018 or 2019. There is no contrary testimony to his approach that that methodology is not common or accepted.

But most important, there's a logic behind the

approach. First, you look internally at the rate compared to its cost. Second, you look externally and create an apples-to-apples comparison with other comparable switch rates; and then, third, you have the history as a check-behind.

CSX cites *Advanced Drainage* and a few other cases for the proposition that Mr. Crowley just uses basic arithmetic.

That's not the case. Mr. Crowley's opinions are to the reasonableness of the rate, and without that expert testimony, jurors will not know to examine the relationship of the tariff to the operating costs and why it's important to have that internal look.

The jurors will not know which costs to compare the Belt Line's $210 rate and how to do so. The jurors will not know which other railroad rates to compare the Belt Line's rate and why those railroads; and, finally, the jurors will not know how to compare those rates and why comparing it on a per-container, per-mile basis ensures an apples-to-apples comparison.

All of CSX's objections to Mr. Crowley's rate analysis goes merely to its weight, not its admissibility.

Turning to drayage, Crowley's opinion is a direct refutation of Marvel's definition of the relevant market. He does compare the price per container for on-dock rail access

to the price per container for drayage as only part of his analysis.

Mr. Crowley -- well, CSX argues that Crowley did not evaluate the operations of drayage and only the cost, but that's not true.

In Mr. Crowley's report at Part IV, he outlines a number of issues with drayage. One of those is the barriers to entry being low for the trucking industry, the low fixed costs of the operations. He talks about the short-haul drivers -- or short-haul routes that allow drivers to return home. Those are priority routes for the drivers.

It talks about the Virginia Port Authority's PRO-PASS system which tries to speed up the trucks going in and out of NIT, and also that it's a 28-minute dray time to get a container to or from NIT via drayage. But he also opines that the drayage and the on-dock rail access at NIT are fungible, in addition to that, because CSX's access over the Belt Line's trackage rates goes through in a -- not the normal -- I'll put air quotes -- not the normal way that NS operates.

NS operates and goes through the south gate, comes out of NIT through the north gate, and makes a loop back down. The Belt Line has to go through a different operational route. It must go into the north gate and come back out through the north gate.

So those additional operations considerations inform Mr. Crowley's opinion that drayage is something that is functionally interchangeable with -- the drayage and rail operations are functionally interchangeable.

So to your question, Your Honor, that can Dr. Marvel ride the functional interchangeability horse? No. Mr. Crowley would say no. You need both the cross elasticity of demand, which Mr. Crowley does provide, and you need the functional interchangeability portion as well.

So in conclusion, Mr. Crowley is one of the foremost railroad rate experts in the United States, and his opinions are well-grounded in fact and common and accepted industry analysis, which satisfies Rule 702. Thus, all of CSX arguments go to the weight of his opinions, not their admissibility.

Any questions from Your Honor?

THE COURT: No. Thank you, Mr. McDaniel.

MR. LACY: Your Honor, just for the record, Michael Lacy on behalf of Norfolk Southern. We, of course, filed a motion in opposition to the motion to exclude Dr. Crowley, and we join in on the Belt Line's agreements.

THE COURT: Thank you.

Ms. Peterson, I'll give you two minutes if you care to respond.

MS. PETERSON: I think we've already responded in

our brief and argument, so nothing further from us.

THE COURT: Thank you very much.

I am prepared to rule on the motion, which is ECF number 374, by CSX to exclude Thomas Crowley, and I'll start by starting with the case law that the attorneys from both sides have discussed.

Rule 702 of the Federal Rules and the line of cases flowing from the Supreme Court's decision in *Daubert* governs both the challenge by the Belt Line and by Norfolk Southern to Mr. Crowley's testimony.

Rule 702 provides that an expert may testify in the form of an opinion if the expert's scientific, technical, and other specialized knowledge will help the jury understand the evidence or determine a basic fact in issue, the testimony is based on sufficient facts or data, it's a product of reliable principles and methods, and the expert has reliably applied those principles and methods to the facts of the case.

Application of Rule 702, as all of you know, involves two primary inquiries; first, whether the proposed testimony is reliable and, second, whether it's relevant. And for that I cite the *Kumho Tire* case, 526 U.S. at 141 and the Fourth Circuit's case in *Forrest*, 429 F.3d at 80.

Before allowing a jury to hear disputed expert testimony, a Court must make those inquiries and exercise its gatekeeping functions, as the Fourth Circuit discussed in

Nease vs. Ford Motor Company, 848 F.3d at 230 and page 231.

The Court assessing the relevance of an expert's testimony reviews, quote, whether it is sufficiently tied to the facts of the case and will aid the jury in resolving a factual dispute. And that's at *Daubert* at 591.

Expert testimony about matters coming within a jury's knowledge and experience is not helpful and is barred by Rule 702 as discussed in the *Persinger* case of the Fourth Circuit. It's a 1990 case at 920 F.2d at 1188.

To assess whether an expert's testimony will aid a jury to understand the evidence and resolve disputed facts, a Court must consider whether such testimony, quote, fits the facts of the case by relating to the inquiry that the jury has to make. And that's *Daubert* at 591 again.

To be deemed reliable, expert testimony must be grounded in, quote, scientific, technical, or other specialized knowledge and not on belief or speculation, and derived from the use of scientific or other valid methods. And that, I'm quoting the *Oglesby* case at 190 F.3d at 250. That's a Fourth Circuit case from 1999.

The *Daubert* decision identified what it referred to as some non-exhaustive guideposts that may apply when assessing reliability, to include testing, peer review, publication, air rates, and general acceptance of the methodology used. And that is at 593 and page 954.

Whether those guideposts or other factors apply to assess reliability often depends on the nature of the case, the expertise applied, and the opinions at issue, as discussed by the Fourth Circuit in the *Sardis* case discussed by Mr. Snow. That's at 10 F.4th at page 281.

As the Fourth Circuit noted in *Nease* at page 230, the Supreme Court's decision in *Kumho Tire* made clear that *Daubert* was not limited to the testimony of scientists, and a nonscientist expert whose opinions arise from his experience must explain, quote, how his experience leads to the conclusion reached, why his experience is a sufficient basis for the opinion, and how his experience is reliably applied to the facts. And I'm quoting there the *Peters-Martin* Fourth Circuit case from 2011 at 410 F.App'x at 618.

Finally, the proponent of expert testimony, as you all know, bears the burden of establishing by a preponderance of the evidence that that testimony is admissible in accordance with these principles. And I'm citing *Cooper vs. Smith & Nephew*, a 2001 Fourth Circuit case, 259 F.3d at 199.

As to Mr. Crowley's qualifications, I find that he possesses the requisite knowledge, skills and experience, education and training to render an opinion on the Belt Line switching rate.

He has an economics degree, took graduate courses in transportation, and has worked as a consultant since 1971

specializing in analyzing matters related to rail transport. He's familiar with the operating practices and accounting procedures that railroads use and has spent his career evaluating railroad rates, costs, and operations including the negotiation of rail and transport contracts. He has also testified before courts, regulatory bodies, and arbitration panels. So I find that he possesses the specialized experience necessary to opine about the reasonableness of the Belt Line's rate.

CSX argues Crowley's opinions on the reasonableness of the rate are not reliable and relevant because, as we've discussed here today:

First, he failed to apply an alternative coherent methodology as opposed to the Surface Transportation Board's reasonableness formula which everyone agrees does not apply. And they contend he used simple math to reach his conclusions;

Second, they argue that he failed to factor in the Belt Line's variable costs;

Third, he allegedly relied only on revenue from rates, ignoring other sources of Belt Line revenue;

Fourth, they complained that he made faulty assumptions that CSX moved two-and-a-half containers per well on average and rates are determined upon a per -mile basis;

Finally, they assert that he failed to consider

whether the Belt Line would have made money under CSX's proposals.

The Court finds Crowley's opinions on the reasonableness of the rate, including his opinion that Dr. Marvel's opinions are based on incomplete analyses, faulty comparisons, false presumptions, to be reliable and relevant.

CSX's argument that Crowley's expertise is limited to determining reasonableness using the Surface Transportation Board's formula, which does not apply in this case, is not persuasive. Crowley's experience analyzing the economics of the railroad industry qualifies him to opine outside the standard used by the STB.

Crowley testified that he applied, quote, normal, commonly used metrics to evaluate the rate based on his experience and, quote, what shippers and railroads normally look at in evaluating rates and revenues. While Mr. Crowley reached his conclusions by applying simple math to that data, this does not render those opinions unhelpful to the jury.

He testified to retrieving data based on his understanding of the metrics involved in determining costs and rates. He factored in his understanding of the location of certain railroad terminals to determine the length of various routes and researched Gulf Coast and East Coast ports that ship international containers and use shortline

switching services.

He relied on his expertise to determine the data that would be relevant to calculate a reasonable rate; expertise that is not, quote, obviously within the common knowledge of jurors, as the Fourth Circuit discussed in *Lespier*. It's a 2013 Fourth Circuit case at 725 F.3d at 449.

CSX next asserts the analysis is faulty because Crowley failed to consider variable costs, instead relying on total costs. And CSX argues that he failed to account for volume and that overall expenses per car decrease as volume increases. Crowley can defend his decision to rely on total costs during cross-examination. His decision to do so does not render those opinions unreliable or irrelevant.

Similarly, while Crowley could be cross-examined about the Belt Line's revenues from sources other than switching fees, Cannon Moss of the Belt Line testified that over 90 percent of its revenue derives from switching fees. Mr. Crowley's failure to factor in revenue from a special switch charge for handling windmill blades and from leasing property is not a persuasive reason to exclude his opinions.

Next CSX argues that Crowley's assumption that CSX could move two-and-a-half containers per well on average is faulty, and CSX cites facts that CSX did not have double-stack capacity between NIT and the Midwest until December of 2016.

Crowley asserts that he relied on numbers used by CSX witnesses, including their 30(b)(6) witness, to arrive at the 2.5 number along with evidence from VIT, Virginia International Terminal, that it loads three containers per railcar well 90 percent of the time.

There is a dispute about the average number of containers per railcar well loaded on CSX trains during the relevant time frame, and this will have to be addressed at trial. That dispute doesn't render Mr. Crowley's opinions on the matter excludable.

As for his consideration of cost on a per-mile basis, CSX's argument that this warrants exclusion also misses the mark. While switching railroads may not tie their rates to route length given the short distances involved, that does not mean that the length of the route does not affect the cost to the railroad to perform the service.

Crowley asserts that the length of the route factors into the cost structure, including fuel consumption and maintenance, and helps compare rates charged by switching railroads with different route lengths.

He acknowledges that he was not retained to opine on whether CSX's proposals could have made the Belt Line money, and his report does not address that issue, and he will not be permitted to testify on that at trial. But that does not also require excluding his remaining opinions.

Accordingly, I find his opinions on the reasonableness of the Belt Line's rates are relevant and reliable, fit the facts of the case, and will assist the jury, and the motion to exclude those opinions is denied.

CSX next asserts that Crowley should not be allowed to opine about historical facts or offer legal conclusions about the Belt Line's governing documents. And in pages 7 through 9 of Mr. Crowley's report, he discusses that 1897 Operating Agreement, the Belt Line's Bylaws, formation of a rate committee in 2009, CSX's 2010 proposal, and its renewed proposal in 2018 as well as actions taken by the Belt Line in response to the proposals.

Mr. Crowley finds that CSX's proposals were outside the parameters of the Operating Agreement and contrary to the Bylaws. He offers this as a counternarrative to Dr. Marvel's assertion that the Belt Line rejected two proposals from CSX that would have been profitable to the company.

Mr. Crowley has not tied his knowledge of railroad rates, costs, and operations to his discussions of these historical documents and events or to any legal conclusions he may seek to draw. His report cites the documents themselves, board minutes, and deposition testimony of Belt Line employees as bases for the history provided.

While he may rely on this information as grounds for his opinions on a reasonable rate and refer to the Operating

Agreement to explain the reason he focuses on costs rather than profit in his calculations, he cannot provide this historical narrative to the jury.

Crowley will also not be permitted to opine that CSX's proposals violate the Agreement and Bylaws. And in that regard, I cite the case of *United States vs. Offill*, 666 F.3d at 175.

As was done in depositions, the Belt Line employees can provide the jury with the history surrounding the proposals and the Belt Line's response.

CSX's motion to exclude Mr. Crowley's testimony providing the historical narrative or legal conclusions about whether those proposals were contrary to the Agreement and Bylaws is granted. Mr. Crowley will, however, be allowed to rely on those documents to explain his approach to calculating a reasonable rate.

With respect to the subject of drayage, I find that Mr. Crowley's experience with railroad structure, operations, costs, contracts, and tariffs over his lengthy economic consulting practice qualifies him to render an opinion on drayage as an alternative to rail service for CSX at NIT.

CSX asserts Crowley's opinions on drayage are not reliable because, as just discussed, he allegedly relies on simple math to compare the cost of drayage to on-dock rail access while adding little to the analysis and because, they

argue, he ignores evidence in the record regarding nonmonetary factors making drayage an unreasonable alternative and, finally, that he allegedly ignored evidence in the record that drayage is only cheaper than on-dock rail due to the alleged anticompetitive conduct.

Crowley opines that the subsidized drayage service that CSX uses to move containers between NIT -- Norfolk International Terminal -- and CSX's intermodal yard at Portsmouth, quote, is an effective alternative to all-rail service over NPBL to NIT, end quote.

He explains that rail and drayage services compete for intermodal shipments throughout the country including at the Virginia Port Authority terminals. Mr. Crowley discusses the economics of drayage versus on-dock rail access at NIT by addressing the VIT subsidy for drayage and how that lowers the cost to dray below the cost of using on-dock rail at NPBL.

He also faults Dr. Marvel for comparing Norfolk Southern's access at the Belt Line to CSX's because Norfolk Southern has its own track that creates efficiencies that cannot be reproduced by the Belt Line for CSX.

Next Mr. Crowley argues that Dr. Marvel downplays the role of trucking in the intermodal freight market, and he references, as discussed, the large number of trucking companies, 145, offering drayage services to the Port of

Virginia and the barriers to entry into the trucking market and fixed cost of operations are the lowest of any freight mode.

He also argues, as Mr. McDaniel mentioned, that the initiation of the PRO-PASS system for trucks at NIT which became mandatory in April of 2018 drastically improved the performance of drayage companies including a reduction in wait times at the terminal gate. He attacks Dr. Marvel's reliance on discussions and data that predate this system at NIT when finding drayage is not efficient.

Mr. Crowley testified that he considered operations, quote, to the extent he could, unquote, along with the economics of using drayage and found that the, quote, operations seemed to favor dray as well.

CSX faults Mr. Crowley for failing to acknowledge the capacity limitations on drayage and limited trucking hours on that route.

Mr. Crowley asserts that the capacity of limitations largely were addressed by implementing the PRO-PASS system. He also asserts that CSX should have lobbied for extended gate hours at NIT, and I note, although CSX asserts the limitations are imposed due to local regulations and not NIT.

CSX also asserts that Crowley fails to address the evidence of record as outlined in CSX's Statement of Facts in support of its motion for summary judgment. This, quote,

evidence of record consists in large part of assertions of fact that are disputed.

Accordingly, I find Mr. Crowley relies on more than simple math to arrive at his opinions regarding the substitution of drayage for on-dock rail access at NIT. If CSX disagrees with the factors Mr. Crowley considered or disregarded or used in arriving at his opinions, CSX can cross-examine Mr. Crowley on those issues.

Accordingly, the motion to exclude Mr. Crowley's opinions on whether drayage is an effective alternative to on-dock rail at NIT is denied.

That's the Court's ruling on Mr. Crowley, and I intend to make rulings on a number of the other motions that have been filed, the motions in limine, and thankfully you will find that my rulings on those are shorter than my ruling on Mr. Crowley.

I am going to reserve on the Dr. Marvel motions, and, also, I'm going to reserve on, I think it's one other motion relating to that, the motion that's ECF number 337, the motion regarding the use of internal e-mails. And then I'm going to reserve on ECF number 349, which is the motion in limine to exclude evidence and argument regarding the internal use of internal Norfolk Southern e-mails.

So I'll next take up Norfolk Southern's motion in limine to exclude evidence and argument that the Belt Line

switch rate is unreasonable.

Give me just a moment.

(Pause in the proceedings.)

THE COURT: Norfolk Southern's motion in limine to exclude evidence and argument that the Belt Line switch rate is unreasonable is denied subject, of course, to the Court's ruling on the pending motions for summary judgment.

The linchpin of Norfolk Southern's argument is that the Surface Transpiration Board, or STB, has sole jurisdiction to decide switch rates for Belt Line. As a result, Norfolk Southern argues that CSX may not ask the trier of fact to assess the reasonableness of the Belt Line switch rate, the Court may not remedy that rate, and the switch rate is irrelevant and beyond the scope of this case.

As Chief Judge Davis explained in ruling on the motion to dismiss with respect to this question of jurisdiction, I quote the STB's exclusive authority over rail carriers' mergers implicates the doctrine of, quote, primary jurisdiction, which, despite its name, is not jurisdictional.

Importantly, despite what the term "primary jurisdiction" may imply, it does not speak to the jurisdictional power of the federal court; it simply structures the proceedings as a matter of judicial discretion so as to engender an orderly and sensible coordination of the work of agencies and courts. That's ECF 395 at 4, and he

quotes a Fourth Circuit case involving *Environmental Technology Council*, 98 F.3d at 789, note 24.

Accordingly, the existence of STB authority to decide whether the Belt Line switch rate is reasonable does not mean that the Court lacks jurisdiction over CSX's claims. Such claims are properly before the Court, and in view of the need to consider, quote, the orderly and sensible coordination of work of agencies and courts, it is also noteworthy that the STB has stayed its proceeding pending the resolution of the case before this Court, with the STB being fully aware of this current litigation.

This leaves the question whether the evidentiary grounds exist to bar CSX from offering evidence as well as argument of an alleged excessive switch rate as proof in support of CSX's pending antitrust conspiracy and contract claims.

As noted by Chief Judge Davis, quote, CSX asserts that the establishment of such rate in 2009, and the maintenance of such rate over time, was the product of unlawful collusion. And that's ECF 395. I'm missing the page cite, but it's footnote 17.

In *Great Northern Railway Company*, the Supreme Court stated that the determination of a past wrong of, quote, an unreasonable or discriminatory rate is a judicial function. And that is at 259 U.S. at 291.

Therefore, in the context of addressing CSX's pending claims, the question of whether the switch rate was excessive and used to block CSX from access to NIT is squarely a judicial function.

Norfolk Southern seeks to bar such evidence on the ground that only the STB is vested with authority to determine the reasonableness of the switch rate and that evidence directed to assessing whether it was excessive is irrelevant.

The jury, however, is not going to be tasked with adjudicating the proper switch rate. The relevant question in the context of the pending claims is whether the defendants conspired and colluded to set the switch rate at an inflated level so as to unlawfully and effectively preclude CSX from gaining on-dock rail access to NIT.

Evidence tending to establish such facts appears at this juncture to be of consequence to the pending claims. Accordingly, the Court denies Norfolk Southern's motion for a blanket exclusion order for such evidence. Of course, the admissibility of testimony and any individual items of evidence remains to be addressed at trial.

Finally, if Norfolk Southern seeks a limiting instruction concerning the proper use of any evidence about the establishment of a switch rate, it should include a proposed instruction as part of its proposed jury

instructions.

That brings me next to ECF number 331, which again is Norfolk Southern's motion in limine to exclude evidence and argument on the loss of customer contracts by CSX.

And the first issue raised in this motion in limine is whether to prohibit CSX from presenting fact-witness testimony that CSX lost or was not awarded contracts with ocean carriers as a result of the defendant's conduct pursuant to Rule 802 of the Rules of Evidence.

CSX's evidence regarding loss of contracts appears to consist of hearsay evidence discussing what ocean carriers told CSX employees, and the hearsay rules will likely prevent the admission of this evidence.

However, the Court cannot rule categorically that CSX cannot present evidence regarding lost contracts without walking through each piece of evidence and hearing CSX's arguments about why the evidence is not hearsay or meets some kind of exception. And for that, I cite *United States vs. Gibson*, 2018 Westlaw 4903261 at *2. That's an Eastern District of Virginia case, October 9, 2018.

The second issue raised, assuming that Dr. Marvel is permitted to testify, is whether to prohibit him from presenting testimony that CSX lost or was not awarded contracts with ocean carriers due to defendant's conduct pursuant to Rule 703.

The relevant inquiry is, first, whether any particular statement is hearsay or meets an exception; second, whether Dr. Marvel would be parroting hearsay without adding anything new to the statement; and, three, which side the balancing test established in Rule 703 favors.

The second and third prongs of this inquiry appear at this preliminary juncture to favor granting the motion, but just as a blanket evidentiary ruling that CSX's counsel and fact witnesses are precluded from testifying or arguing that an ocean carrier has denied CSX's business due to the lack of on-dock rail access at NIT is premature. The same is true regarding the scope of Dr. Marvel's potential testimony.

Accordingly, the motion is denied without prejudice to timely objection at trial. CSX is ordered to avoid discussing hearsay statements during opening statements, and should Dr. Marvel be allowed to testify, counsel for CSX is also directed to exercise care in eliciting testimony from him with an eye to the trial judge's rulings on the contested evidence.

That brings me next to Norfolk Southern's motion in limine regarding discontinuance of the Diamond Track. That motion seeks to prohibit CSX from offering at trial any evidence or argument that the discontinuance of the Diamond Track constituted anticompetitive conduct by the defendants. And that motion is denied without prejudice and, of course,

subject to the Court's ruling on the motions for summary judgment.

Norfolk Southern argues that CSX should not be allowed to relitigate the final judgment of the STB in 2008 proving the discontinuance of the Diamond Track. The Court agrees that CSX does not have standing to contest that decision and the Court does not have jurisdiction to overturn it.

CSX asserts it will offer evidence of the Diamond Track closure as one means by which Norfolk Southern sought to block CSX's access to on-dock rail at NIT for anticompetitive gain.

As addressed in the ruling on Norfolk Southern's motion to dismiss, this Court has jurisdiction over the antitrust and related state law claims pending before the Court.

To the extent CSX can prove at trial that the closure of the Diamond Track was undertaken to block CSX's access to on-dock rail at NIT, the evidence, to the extent that it's not time-barred, appears to be relevant to claims at issue under Rule 401 of the Rules of Evidence.

Norfolk Southern's argument that this evidence will confuse and mislead the jury is not persuasive. The facts surrounding the discontinuance of the track including the Surface Transportation Board's approval of the closure and

CSX's failure to object at that time can be presented to the jury.

Accordingly, the probative value of the evidence is not substantially outweighed by dangers of confusing or misleading the jury, and the evidence should not be excluded pursuant to Rule 403.

Norfolk Southern further argues that any evidence surrounding the Belt Line's meetings and Surface Transportation Board proceedings addressing the Diamond Track fall far outside the relevant time period, making the evidence irrelevant and inadmissible as it relates to the statute-of-limitations question.

That is a matter that the parties and the Court can revisit as needed following the Court's ruling on the motions for summary judgment.

Next I will address ECF number 353, which is the Belt Line's motion in limine to exclude evidence and argument about CSX's private switching rates.

The Belt Line's motion in limine to exclude evidence or argument about other contractual switching rates paid by CSX is denied.

Belt Line seeks to exclude that evidence and argument on the grounds that it's not relevant and, even if it were, it's unduly prejudicial pursuant to Rules 401, 402, and 403 of the Rules of Evidence. And, respectfully, I do

disagree on both points.

Belt Line's relevance argument mostly relies on the *Laurel Sand* case that was discussed today, which is at 704 F.Supp. at 1323. And although the Court there stated that the reasonableness of a rate is determined, quote, in the context of competition rather than from the plaintiff's perspective, it nowhere indicated that negotiated contract switching rates should be excluded from the determination of whether a rate charged was anticompetitive; rather, it noted that a plaintiff's inability to pay a certain rate does not mean that the rate is anticompetitive.

Notably, the Court is *Laurel Sand* looked at the defendant's costs and the rates it charged another company, Millville Quarry, and determined that a rate offer slightly in excess of variable cost was not an anticompetitive rate. That's at Pages 1323 and -24.

CSX seeks to offer evidence about its contractually negotiated rates with other switching railroads for services allegedly similar to those provided by Belt Line.

As a general proposition, the Court agrees that such evidence is relevant to the market price for switching rates and whether the Belt Line's switching rate is anticompetitive; nor is there any evidence that the contract rates were negotiated in other than arm's length transactions.

Belt Line's argument about any differences between contractually negotiated and public tariff-based switching rates goes to the weight, rather than the admissibility, of such evidence. It fails to support Belt Line's request for a blanket order of exclusion.

To the extent that Belt Line claims it lacked knowledge of CSX's contractually negotiated switch rates, Belt Line may seek to offer evidence about what it knew and the manner in which it set its public tariff switching rate, and the jury may consider the same in assessing whether such was excessive or anticompetitive.

Finally, nor is the admission of such evidence by CSX, or argument, unlikely to engender unfair prejudice to the defense by means of confusion or misleading the jury.

The Court is confident that a properly instructed jury can assess all the evidence, including any differences between the switch rates established by public tariffs and those agreed to in contract negotiations. Accordingly, the probative value of the contested evidence is not substantially outweighed by danger of unfair prejudice.

Next I will address ECF 359, which is the Belt Line's motion in limine to exclude evidence and argument from nonparties. And by that they refer to Virginia Port Authority and Virginia International Terminal officials.

The motion in limine to limit evidence and argument

from those nonparties is granted in part and denied in part without prejudice.

The motion is denied without prejudice as to testimony and evidence from current and former VPA and VIT employees about, one, the Belt Line switch rate; two, CSX's rail access to NIT; and, three, the April 13, 2018, letter from John Reinhart to Cannon Moss described in the Belt Line's motion.

The decision line between admissible versus inadmissible testimony about such matters is likely to be a fine one and cannot be made in a vacuum, essentially at a motion in limine phase in this case, without understanding the foundation laid for any such testimony, the question asked, and the information sought to be elicited.

Although Belt Line may well be correct that such witnesses should be foreclosed in characterizing the Belt Line switching rate as unreasonable and the like, with a proper foundation such witnesses may be allowed, for example, to compare the Belt Line's rate to other switching rates.

Likewise, with timely and proper objections, such witnesses may not be allowed to characterize CSX's rail access as, quote, improper or, quote, inequitable. However, such witnesses may have personal knowledge of events that permits them to offer less legally charged characterizations of their observations concerning the extent of CSX's access

to NIT, and these questions are best addressed during trial.

For similar reasons, issues concerning the probative value and any prejudice stemming from admission of the April 13, 2018, letter are also reserved for trial.

Although CSX denies any intent to offer such testimony, to the extent it may seek to elicit testimony from such employees that they or the VPA or VIT, quote, support CSX's legal claims in the case, the motion in limine is granted; such testimony is irrelevant.

Further, as it falls to the jury to assess CSX's legal claims and any defenses thereto, any such testimony explicitly endorsing or vouching for CSX's legal claims by a quasi-governmental agency or its employees would also be highly prejudicial to the defense and subject to exclusion under Rule 403.

The Court reserves for trial questions about the admissibility of other testimony from such employees relating to VPA and VIT's desire for the parties to find a solution to facilitate greater use of NIT, and, finally, the proper scope of any argument based on the actual testimony and other evidence introduced through such employees is reserved for trial.

Next up is ECF 365, which is the Belt Line's motion in limine to exclude evidence and argument from CSX witnesses who lack personal knowledge. They reference some witnesses;

Robert -- I may not pronounce his name correctly -- Girardot, Chris Wagel, and Carl Warren.

My question for you, Mr. Hatch, is does CSX intend to call them to testify, or are we dealing with deposition testimony from these witnesses? Do you know?

MR. HATCH: Your Honor, we will be calling Mr. Girardot. We will not be calling live Mr. Warren and not as to Mr. Wagel either.

THE COURT: Do you intend to present evidence from them via depositions?

MR. HATCH: Yes, Your Honor.

THE COURT: Very well. Thank you.

MR. HATCH: Thank you.

THE COURT: With respect to the Belt Line's motion in limine to exclude evidence from the CSX witnesses who reportedly lack personal knowledge, the motion is granted in part and denied in part without prejudice.

And I grant the motion only in one respect; namely, that Mr. Girardot is precluded from testifying about statements, A, reportedly made by VIT management to Ocean Network Express personnel about the capacity to reliably dray containers between NIT and CSX's Portsmouth terminal and, B, made by Ocean Network Express personnel indicating that that carrier would have chosen CSX for business but for, or in significant part due to, concerns about CSX's lack of on-dock

access at NIT.

This hearsay is inadmissible for the truth of the matter asserted in the statements Mr. Girardot describes. Similarly, because the probative value of such evidence does not substantially outweigh the dangers of unfair prejudice and risks that such evidence may mislead the jury, nor may CSX solicit testimony from Dr. Marvel about those statements if he's allowed to testify.

I have also considered the evidentiary arguments concerning admission of the remaining evidence and testimony identified in the Belt Line's motion concerning lost business opportunities allegedly sustained by CSX, the operation and application of the Belt Line's tariff, the preferences and practices of ocean carriers, calculations of the average number of shipping containers stacked by CSX in railcar wells, and the inadequacy of drayage as an alternative to on-dock rail access.

Having considered the affidavits at issue and the deposition testimony in question, the Court finds that it cannot conclude at this preliminary stage that all forms of testimonial evidence about those subjects is inadmissible as a matter of law.

To the contrary, questions of context, the knowledge and experience of the witnesses in question, the adequacy of any foundation laid for testimony about such topics, the

nature of the questions asked, the purpose for which any testimony is offered, and ultimately the admissibility of any such testimony are matters to be addressed at trial or, with respect to any depositions, possibly during the pretrial conference, and any deposition designations that are objected to.

Accordingly, in all other respects, the Belt Line's motion is denied without prejudice.

For the same reasons, and assuming for the purposes of this motion that Dr. Marvel is allowed to testify, the motion is also denied without prejudice to the extent that Dr. Marvel bases his opinions on testimony and evidence about the foregoing matters aside from those that I specifically identified with respect to Mr. Girardot's statements.

Again, I caution counsel for CSX to exercise care in eliciting testimony from Dr. Marvel with an eye to the trial judge's or possibly my rulings on deposition designations about whether testimony on the topics described is admitted or denied.

Next I address ECF number 378, which is CSX's motion in limine to preclude mischaracterization of its rate proposals. This motion is denied subject, of course, to the Court's rulings on the pending motions for summary judgment.

CSX seeks to exclude such evidence and argument on the ground that it is incorrect, improper, irrelevant, and

prejudicial pursuant to the Federal Rules of Evidence.

The Court has considered the arguments relating to admissibility of evidence and argument concerning, first, whether CSX's 2010 and 2018 proposals were nonuniform rate proposals and, two, acceptance of CSX's proposals would have violated the Belt Line's Operating Agreement.

To start, the Court does not find that its previous order addressing the defendant's motion to dismiss -- and I refer to ECF number 66 at pages 26 to 28 -- precludes evidence and argument at trial about those two subjects.

At the present juncture, the Court is not tasked with evaluating the sufficiency of CSX's claims and pleadings but must decide whether to exclude broad categories of evidence from trial.

If evidence of these two proposals is admitted, one potential trial issue concerns whether the Belt Line and Norfolk Southern's treatment, handling of, and reaction to the 2010 and 2018 proposals constituted anticompetitive acts and/or evidence of an unlawful conspiracy.

Statements and acts contemporaneous with those events, including those addressing the formation of and reaction to the proposals, the parties' understanding about the proposals at the time, questions asked and answered and provided at the time, and the parties' views at the time about the interplay, if any, between the proposals and the

Operating Agreement appear at this juncture to be relevant to issues of alleged anticompetitive and conspiratorial behavior.

CSX's contention that the Belt Line previously considered and allegedly maintained nonuniform rates does not warrant a blanket exclusion of the types of evidence just described.

If evidence that the Belt Line had nonuniform rates exists, CSX may offer it to cast doubt upon the Belt Line's interpretation of the Operating Agreement and/or its treatment and handling of the two disputed proposals.

Finally, the admission of the evidence just described by the Court, or argument reasonably based thereon, would not unduly prejudice CSX by misleading or confusing the jury as its probative value appears not to be substantially outweighed by any prejudice ensuing from admission.

If, as CSX contends, one or both defendants attempt to offer after-the-fact explanations and/or acts and omissions not undertaken at or around the time the proposals were submitted and considered, the Court can best address that at trial by timely objection to the evidence when offered or argument when made.

Let me check with my clerks a moment.

(Pause in the proceedings.)

THE COURT: Aside from the motions that I have

reserved on, then, I think that concludes our business here today. Thank you for your patience and efforts here this afternoon. I appreciate your hard work on this case and your excellent briefing and argument.

MR. HATCH: Thank you, Your Honor.

MR. SNOW: Thank you, Your Honor.

(The proceedings adjourned at 4:04 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____/s/_____

Carol L. Naughton

January 6, 2023